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MR. D. R. SOMAN I.C.S.

(* *Indicates that the judgment is not printed but only the* Law Point, *arising in it, is published*).

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BEFORE MR. E. WESTON, I. C. S.

Jawand Lal Dutt Chowdhry, M. A., LL. B., Advocate, Ajmer.
Applicant.

Versus

Crown .... Opposite Party.

Criminal Revision Application No. 60 of 1934, decided on February 22, 1935 against the order of the Additional Sessions Judge, Ajmer, passed on October 6, 1934 in Criminal Revision Application No. 45 of 1934.

Police Act (V of 1861)—S. 31 and S. 32.—Scope:

In exercise of their duties under S. 31 the Police have no authority to demand entrance into the private houses of persons unconnected with the procession.

The police have no inherent right to enter upon private property in order to facilitate the discharge of their duties. They can do so as of right only by virtue of statute empowering them to do so. The criterion for an offence under Section 32 is not whether the orders are reasonable.

Criminal Procedure Code—S. 42—Only personal assistance can be demanded—Police cannot require a person to put his house at their disposal.

The assistance which may be demanded clearly is the personal assistance of the person of whom it is demanded. The police cannot require a person to put his house at their disposal.

Mr. Abdul Qadir Beg:—For Applicant.
Khan Bahadur Abdul Wahid Khan:—For Crown.

Judgment.—This is an application to set aside a conviction under section 32 of the Police Act (Act V of 1861) and sentence of five rupees only, but a point of some importance is involved.

It appears that on 16th October 1933 a procession was proceeding through the streets of Ajmer. It was following a route prescribed by the authorities, but the Police were apprehensive lest it might be the cause of a breach of the peace. Present applicant is the occupier of a house on a road along which the procession was to pass. He admittedly had no concern with the procession and was not a person suspected as likely to cause any breach of the peace. The Sub Inspector of Police desired to post one of his men on the roof of applicant's house to observe any action such as stone throwing which might take place, and requested or ordered applicant to allow a constable to go through his house in order to get on to the roof. Applicant demurred or refused on the ground that the privacy of females would be disturbed, and the Sub Inspector did not attempt to force an entrance. Applicant was then prosecuted under section 32 of the Police Act on the ground that he had opposed or not obeyed an order given under section 31 of that Act. He was convicted and fined. A revisional application was rejected by the Additional Sessions Judge, and he has now come to this Court in revision.

The question at issue is whether in exercise of their duties under section 31 the Police have authority to demand entrance into the private houses of persons unconnected with the procession. In my view they have not. Section 31 reads :

> "It shall be the duty of the Police to keep order on the public roads, and in the public streets, thoroughfares, ghats and landing places, and at all other places of public resort, and to prevent obstructions on the occasions of assemblies and processions on the public roads and in the public streets, or in the neighbourhood of places of worship, during the time of

public worship, and in any case when any road, street, thoroughfare, ghat or landing place may be thronged or may be liable to be obstructed".

No doubt this duty ordinarily cannot be performed without orders being given to persons present in the public roads, streets or places. Orders may be given requiring persons to move on, to disperse, to refrain from cries and so on, and persons disobeying such orders will render themselves liable to prosecution under section 32. But I am unable to agree that the duty imposed by section 31 means that the Police may take any action they think fit involving interference with private rights and property provided that action will in some degree assist them in keeping order in some public place.

The assistance which may be demanded under section 42 of the Criminal Procedure Code clearly is the personal assistance of the person of whom it is demanded. The Police cannot repuire a person to put his house at their disposal.

The case relied upon (50 I. C. 489) has little or no application to the facts of the present case. It was held only that under section 31 the Police had authority to order shouting and music from a procession in a public road to cease.

I should not be understood to mean that there was anything improper in the Sub-Inspector making the request he made, but the Police have no inherent right to enter upon private property in order to facilitate the discharge of their duties, and they can do so as of right only by virtue of statute empowering them to do so. An example of such statutory provision may be found in section 24 of the Bombay City Police Act.

The request of the Sub-Inspector may not h[illegible] reasonable, but when the Police attempt to gi[illegible]

side the areas to which section 31 refers the criterion is not whether the orders are reasonable.

I allow the application and set aside the conviction and sentence. The fine if paid should be refunded.

Revision Accepted.

BEFORE MR. E. WESTON, I. C. S.

Umrao .... Defendant-Appellant.

Versus

Mahadevi, Mst. and *another* .... Plaintiff-Respondent.

Civil First Appeal No. 2 of 1934, decided on March 18, 1935, against the decree passed by District Judge, Mount Abu, on September 10, 1934 in Civil Case No. 5 of 1934.

Civil Procedure Code—O. 6, R. 17—Suit on allegation of tenancy failing—Plaintiff not allowed to succeed on title :

Plaintiff's case was that defendant was her tenant on an agreed rent. Defendant denied plaintiff's title, asserted his own and denied any relationship of landlord and tenant.

On evidence it was held that plaintiff's title was proved and that there was no definite evidence of defendant's tenancy.

Held, in the suit as framed the question of title to the property could not be gone into and the plaintiff having failed on the plea of tenancy could not be allowed a decree for ejectment on the basis of title. *Civil Second Appeal No. 15 of 1929, 57 C. 391, 1925 All. 705 and 1926 Sind 98* Foll; *25 A. 356* not applicable.

Cause of action—Test of distinction :

When a fiscal distinction is made between two causes of action, it is not improper to hold that these are two distinct causes of action.

Mr. Mohan Lal Capoor—For Appellant.

Mr. Daya Shanker Bhargava—For Respondent.

Judgment – This is an appeal against the decision of the District Judge, Mount Abu, in suit No. 5 of 1934.

The suit was filed by Mst. Mahadevi widow of Ram Swarup on her own behalf and on behalf of her minor son to recover Rs. 300 alleged to be due from defendant on account of rent of property occupied by him and for ejectment. Court fee was paid under section 7 IX (cc) of the Court Fees Act, and while the plaint does not mention how the tenancy originated it is clear from the plaint and from the evidence led that plaintiff's case was that defendant was her tenant on an agreed rent.

Defendant denied plaintiff's title, asserted his own on a will and denied that any relationship of landlord and tenant existed between him and plaintiff.

The learned District Judge held that plaintiff's title was proved, that there was no definite evidence of defendant's tenancy but he must be a tenant as he had no right of occupation as owner, and that as defendant was plaintiff's agent after her husband's death, his occupation must have been permissive and he must be taken to be a tenant-at-will. A decree in ejectment was allowed. Against this decree defendant has come in appeal.

As already stated it is plaintiff's case not that defendant is a tenant-at-will but that he is a tenant on a definite agreement at a fixed rent. The evidence of this agreement does not appear to have been believed by the District Judge and I do not think it can be accepted. Under these circumstances the relationship of landlord and tenant which was denied by defendant cannot be taken as proved.

The question then is whether in the present suit the question of title to the property should be gone into, and whether plaintiff having failed on the plea of tenancy can be allowed a decree for ejectment on the basis of title.

In a case of this Court, *Golak and others* v. *Mst. Beli*[1] it was remarked.

> "The original case was for tenancy; now the defendants are treated as trespassers and the appellants want damages for use and occupation. If it comes to making out a new cause of action, that cannot be permitted".

In *Gobindakumar Sur* v. *Mohinimohan Sen*[2] it was remarked that in a suit brought by a landlord against his tenants, if the Court held that there was no relationship of landlord and tenant between plaintiff and any of the defendants the proper course was to dismiss the suit against that defendant.

In a case reported in A. I. R. 1925 All. 705 it was considered that in a suit on an allegation of tenancy plaintiff should not be allowed to succeed on failure to prove that a relationship of landlord and tenant existed.

On the other hand in a Sind case (A. I. R. 1926 Sind 98) it was held that a plaintiff failing to establish tenancy can succeed on title. Reference was made to a case reported in I. L. R. 25 All. 256, but it does not seem to have been noticed that this case is prior to the enactment of clause (cc) of section 7 (IX) of the Court Fees Act.

Clause (cc) permits a particular type of suit to be brought on a reduced Court Fee. Although the Court Fees Act may be described as a fiscal enactment it is, I conceive, the duty of the Courts to see that it is not evaded. When a fiscal distinction is made between two causes of action, it is not improper to hold that these are two distinct causes of action.

I hold therefore that plaintiff if she wishes to sue on her title must do so by separate suit and that she should not be allowed a decree in the suit as framed.

I allow the appeal and set aside the order of the trial Court. The suit is dismissed with costs throughout.

Appeal allowed.

(1) C. S. A 45 of 1929. (2) I. L. R. 57 Calcutta 349.

BEFORE MR. E. WESTON, I. C. S.

Kishan Lal and *others* .... Appellants.

Versus

Kanhiya Lal .... Respondent.

Criminal Appeals No 14 to 17 of 1934, decided on February 21, 1935, against the order passed by Additional District Judge, Ajmer, on October 26, 1934 in Miscellaneous Appeal No. 1 of 1934.

Criminal Trial—Prosecutions for perjury should not await the final pronouncement of Appellate Courts.

Prosecutions for perjury should not await the final pronouncements of Appellate courts on the merits of the suit in which the statements were made. The delay is unfair to the accused who after several years find themselves called upon to answer a charge. If there is a reasonably strong case courts should be prompt to take action. If accused persons consider it in their interests to obtain postponement of their cases pending an appellate pronouncement on the merits of the original suit, it is open to them to seek it.

Mr. Moti Lal Malavyar—For the accused.

R. B. Mithan Lal Bhargava & Mr. Sri Lal Agarwal—For the Respondent.

K. B. Abdul Wahid Khan—For the Crown.

Judgment.—This is an appeal against the order of the Additional Sessions Judge directing the prosecution of the four appellants for giving false evidence on behalf of the defendant in civil suit No. 147 of 1930.

The evidence said to be false consists of statements relating to a document ex. D/8 and the rough substance of the statements is that this document which shews payments made to plaintiff on account of two mortgages was written according to the dictation of plaintiff from endorsements on the backs of the two mortgage deeds.

The suit was on the second mortgage. It was admitted that the first had been redeemed.

The endorsements on the suit mortgage ex. P. 1/A correspond exactly with the details relating to that mortgage in ex. D/8. In ex. D/8 some 13 entries purport to relate to the first mortgage. That mortage deed was not produced until a very late stage, when plaintiff represented he had discovered it in the possession of a nephew of deceased mortgagor. The endorsements on it have not been proved. These endorsements are only three in number. One amount corresponds with one of the 13 entries in D/8, and admittedly the two others are only totals of a series of payments. Their total differs from the total of the entries in D/8 by about Rs. 100/- only. The difference between the two therefore is more apparent than real.

The falsity of ex. D/8 does not speak for itself, and the motive for fabricating such a document is by no means clear. No doubt plaintiff who has sought this prosecution will deny the statements that he dictated the contents of D/8 but this will be a question of word against word.

The statements of appellants upon which the prosecution would be based were made as long as four years ago. The delay may be said to be due to proceedings in appeal. I am not in agreement with the view that prosecutions for perjury should await the final pronouncements of appellate Courts on the merits of the suit in which the statements were made. The delay is unfair to the accused who after several years find themselves called upon to answer a charge. If there is a reasonably strong case Courts should be prompt to take action. If accused persons consider it in their interests to obtain postponement of their cases pending an appellate pronouncement on the merits of the original suit, it is open to them to seek it.

In the circumstances I do not consider that useful purpose will be served by proceeding with these prosecutions. I allow the appeals and set aside the order of the Lower Court.

Appeals Accepted.

BEFORE MR. E. WESTON, I. C. S.

Mohrilal and *another* .... Plaintiffs-Applicants.

Versus

Alam Ali, Syed and *others*....Defendants-Opposite Parties.

Small Cause Court Revision No. 111 of 1934, decided on February 28, 1935, against the order passed by the Small Cause Court, Ajmer, on June 26, 1934 in suit No. 4061 of 1933.

Contract Act (IX of 1872)—Section 23—Consideration to obtain withdrawal of prosecution is legal.

A bond executed by third persons to enable the accused to secure th compounding of an offence is for legal consideration, *53 Calcutta 51* an *50 Calcutta 774* **Followed.**

To obtain withdrawal of a prosecution through the proper authoritie is not suppression of prosecution, *11 Bombay 566* **Not applicable.**

Mr. *Kaushal Das Deedwania*—For Applicant.

Mr. *Abdul Qadir Beg*—For Opposite Parties.

Judgment—Plaintiff sued on an instalment bond whicl admittedly was executed by the three defendants. Althougl in the bond the consideration is said to be cash, it is admittec that at the time no cash was paid, and that the bond wa: passed to secure the compounding of a criminal case o: cheating which had been filed against defendant no. 3. This defendant had pledged to plaintiff ornaments alleged to be gold for a sum of Rs. 1,120, and as some of these ornaments were found to be of base metal plaintiff initiated the case of

cheating. The case was compounded with the permission of the Court, and it is admitted that the suit bond represented part of the arrangement by which plaintiff was to recover his money. Defendants 1 and 2 are brothers of defendant No. 3, and joined in the bond to enable him to secure the compounding of the offence.

The trial Court held that the bond was for valid consideration against defendant No. 3 but not against defendants 1 and 2. Plaintiff now applies in revision and claims that he was entitled to a decree against all three defendants.

I consider that plaintiff must succeed. The case relied upon by the trial Court reported in I. L. R. 11 Bombay 566 was a case where the consideration was supression of a prosecution for criminal breach of trust as a servant which is not a compoundable offence and it has no application to the present case.

In *Famindra Narain Roy* v. *Kacheman Bibi*[1] a third person had joined in executing a mortgage bond in consideration of the mortgagee not enforcing an earlier mortgage against a member of the third person's family. It was held that the third person had received consideration.

In *Dwijendranath* v. *Gopiram*[2] a case of criminal breach of trust as a servant had been filed. The accused and his brother executed a mortgage to the employer for an amount less than the amount said to have been misappropriated with a view to effect withdrawal of the prosecution. The employer then approached the Commissioner of Police and obtained a withdrawal of the prosecution. It was held that the consideration was good and not against public policy, and that not only the person accused but also his brother were liable under the mortgage executed by them.

(1) I. L. R. 50 Calcutta 774. (2) I. L. R. 53 Calcutta 51.

This case is not in conflict with the Bombay ruling. To obtain withdrawal of a prosecution through the proper authorities is not suppression of prosecution.

It must be held that against defendants 1 and 2 there was legal consideration.

The application is allowed. The suit is decreed with costs against all three defendants. Defendants 1 and 2 must bear the costs of plaintiff in the present application.

Revision Accepted.

BEFORE MR. E. WESTON, I. C. S.

Mohanlal and *others* .... Plaintiffs-Applicants.

Versus

Firm Radhalal Pirbhulal.... Defendants-Opposite Party.

Small Cause Court Revision, No. 125 of 1934, decided on March 18, 1935, against the order passed by the Small Cause Court, Ajmer, on July 17, 1934 in Suit No. 3862 of 1933.

Civil Procedure Code—Order 6, Rule 17—When certain members of a joint Hindu family sue, amendment may be allowed to make it clear that they sue on behalf of the joint family.

Certain members of a joint Hindu family sued in their names without any suggestion in the plaint that they were doing so on behalf of the joint firm. An application was subsequently put in to amend the plaint stating that plaintiff formed a joint family with other members and seeking to add to the heading of the plaint the words "as members and on behalf of the joint Hindu family."

Held, the amendment sought, being bonafide, is not more than a matter of form and be allowed. *33 A. 272, 35 A. 549, 34 B. 178, 12 L. 428* **Followed.**

Mr. *Raghunath Agarwal*—For Applicants.

Mr. *Daya Shanker Bhargava*—For Opposite Party.

Order—This is a suit on a hundi executed in the year 1930 in favour of "Shev Dutt Chandanmal". It appears that Shev Dutt was the father of Chandanmal but had been dead for some years when the hundi was executed. Chandanmal died in the year 1932 before the suit was filed. Chandanmal left three sons one of whom is a minor, and he also had three brothers all of whom are alive.

The plaint is headed "Shev Dutt now deceased by his sons Mohanlal and Har Niwas, and Chandanmal now deceased by his son Gulab Chand". The plaint contains no suggestion that Shev Dutt Chandanmal was the name of the joint firm or in fact that the persons suing were joint.

Defendant by his written statement objected that all the sons of Shev Dutt and of Chandanmal had not been joined.

An application was then put in to amend the plaint stating that plaintiffs formed a joint family with other sons of Shev Dutt and of Chandanmal and seeking to add to the heading of the plaint the words "as members and on behalf of the joint Hindu family"

The trial Court refused to allow the amendment although conceding that it was made in good faith and that it did not change the cause of action It held that the amendment was tantamount to adding plaintiffs after the period of limitation had expired.

In the Privy Council case *Krishna Prasad and others* v. *Har Narain Singh*[1] it was held that when a joint family business has to be carried on in the interests of the joint family, the managing members who are entrusted with the management may make contracts in their own names and may maintain suits to enforce those contracts without joining as parties other members of the family.

(1) I. L. R. 33 All 272.

In *Harilal* v. *Manum Kumar*[1] it was considered that in the case of a joint Hindu family what is required is that all persons whose interests are to be affected by the suit are sufficiently and substantially represented. In the case of a joint Hindu family all members are represented by the manager and are substantially parties to it through the manager. It was also remarked by Banerji J. "I do not think that it is essential that the manager, when he brings the suit, should state in distinct terms that he is suing as manager".

The view of Banerji J. was followed in a Bombay case reported in A. I. R. 34 Bombay 178.

In *Ram Kishore and others* v. *Ganga Ram*[2] it was held that in a suit by a manager on behalf of the family it is the question of fact whether he is the manager and not the form in which he sues which determines whether a manager has the right to sue.

I think that this view is correct. If in fact plaintiffs are managing members of the family business they are entitled to sue on behalf of other members. Defendant is entitled to have his position safeguarded by having the representative nature of the suit made clear, but the amendment sought, the bona fides of which is not questioned, is not more than a matter of form to make this position clear. Plaintiffs no doubt have been careless in their drafting of the plaint, and even the amendment sought perhaps is not as definite as it should be but their fault can be dealt with suitably by an order as to costs. As I do not consider on the pleadings that the amendment should be taken to mean joinder of fresh parties I think it should be allowed.

I set aside the order of the trial Court. The amendment should be allowed and the suit disposed of after giving defendant an opportunity to file further written statement. Applicants must bear the costs of defendant in this Court.

Revision Accepted.

(1) I. L. R. 35 All. 549. (2) I. L. R. 12 Lahore 428.

BEFORE MR E. WESTON, I C S

Narsingh Das and *another* Defendant-Applicants

Versus

Ram Kanwar Plaintiff Opposite Party

S C C Revision No 128 of 1934 decided on March 4, 1935, against the order passed by the Small Cause Court, Ajmer, on October 18, 1934 in suit No 1792 of 1934

Limitation Act (1908)—Section 19—Suit cannot be based on mere acknowledgment—Contract Act, Section 25

A mere acknowledgment of an older debt without a promise to pay, cannot be made the basis of a suit *1 A M L J 16, 22 B 513 32 B 521 56 A 291* Foll *1926 A M L J Supplement 1 1926 A M L J Supplement 29, 5 A M L J 51 16 B 24*, Not Followed 3 C 1047 Not applicable

A distinction should however be drawn between an acknowledgment which contains an express promise to pay and one from which a promise to pay can be inferred

Mr Sri Krishn Agarwal—For Applicants

Mr Chand Karan Sarda—For Opposite Party

Judgment—The main question in this revision application is whether an acknowledgment of a past debt can form the basis of a suit to recover the debt or whether the creditor must sue on the original cause of action

The acknowledgment in the present case is in the following terms

> Onkhan of Narsingdasji son of Chunnilalji Lakotia Charmalji son and grandson resident of Shrinagar Mitt Jeth Bud 9th, Samwat 1988 and interest at ⅞
>
> Cash balance rupees two hundred and sixty five and annas eleven of Narsinghdas Lakotia Chunnilal
>
> Rs 265 11 0
>
> signatures over one anna stamp'

It is admitted that the Rs. 265-11-0 represents a past debt with interest added at a rate previously charged namely the rate stated in the heading.

The learned Small Cause Court Judge held that the suit on this acknowledgment is maintainable, and considered himself bound by two rulings of this Court in *Muka* v. *Banna*[1] and *Ram Chander* v. *Sheo Nath*[2] reported in Ajmer Merwara Law Journal Supplement 1926 at page 4 and 29.

The decisions of this Court have not been entirely consistent. In *Codd* v. *Magu Lal*[3] It was held by Murphy J. C. that the acknowledgment in that case would serve to renew limitation under section 19 of the Limitation Act, but not to exempt the plaintiff from proving his real cause of action which must be the goods supplied or the money lent. No case law was cited in this ruling.

In *Muka* v. *Banna*[1], Baker J.C. held that it had been settled by the Privy Council in *Mani Ram* v. *Rupchand*[4] followed in *Chunnilal* v. *Lachman Govind*[5] that an acknowledgment can from the basis of a suit (Ajmer Merwara Law Journal Supplement 1926, page 4).

In *Ram Chander* vs. *Sheo Nath*[2] Barlee J.C. held that an acknowledgment in the form "Balance struck and signed. Balance to be paid" amounted to an acknowledgment of liability and a promise to pay. Reliance again was placed upon the Privy Council and Bombay cases mentioned above. It was held that a suit lay on such an acknowledgment.

In *Dhan Raj* v. *Kalu*[6] Macklin J. C. held that a suit on a khata baki containing an acknowledgment

(1) 1926 A.M.L J. supplt. 4. (2) 1926 A.M.L J. supplt. 29. (3) 1 A.M.L.J. 16.
(4) I.L.R. 3 Calcutta 1047. (5) I L.R. 46 Bombay 24. (6) 5 A.M.L J. 51

by the debtor was tantamount to a suit on a promissory note, and therefore all joint promisees have the right to claim performance of the promise.

Now the Privy Council cases did not decide that an acknowledgment can form the basis of a suit. The question considered was whether an acknowledment in that case renewed limitation under section 19 of the Limitation Act, and a considerable portion of the judgment deals with the position as it would exist under English law. Approval was given to a ruling of Lord Justice Mellish which laid down that an acknowledgment to take the case out of the Statute of Limitations must be either one from which an absolute promise to pay can be inferred, or secondly an unconditional promise to pay the specific debt or thirdly there must be a conditional promise to pay the debt, and evidence that the condition has been performed. It was then considered that an unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if there nothing is said to the contrary.

In the Bombay case it was held that a suit could lie on a khata baki It was held that the Privy Council case "in effect" had overruled an earlier decision of the Bombay High Court, *Shanker* v. *Mukta*[1]. In this last case the khata was similar to that in the present case. It was held that the khata was only evidence of the debt and did not form a fresh contract upon which a suit could be brought.

The later rulings of this Court and that in 46 Bombay rely upon the dictum of the Privy Council that an unconditional acknowledgment implies a promise to pay and it has been inferred that this promise amounts to novation of contract. In my opinion however a distinction should be drawn between an acknowledgment which contains an express promise to pay and one from which a promise to

(1) I. L. R. 22 Bombay 513

pay can be inferred. Article 1 of Schedule 1 of the Stamp Act provides that a mere acknowledgment must bear a stamp of one anna. An acknowledgment which contains a promise to pay must be stamped as an agreement or as a promissory note. The distinction also has been recognised by the Bombay High Court in the case of acknowledgment under section 25 (3) of the Contract Act. In *Mugmal* v. *Amir chand*[1] it was held notwithstanding the Privy Council ruling that an implied promise to pay, inferred from an acknowledgment which contains no express promise to pay a time barred debt, cannot be made the basis of a suit under section 25 (3) of the Contract Act.

If acknowledgment always means novation of contract section 19 of the Limitation Act would seem largely unnecessary.

There is a recent decision of the Allahabad High Court in *Bal Krishna* and *others* v. *Debi Singh*[2]. In this the Privy Council case was referred to and it was held that this decision did not touch the point whether a suit can be maintained on a mere acknowledgment. Mukerji and Young J J. declined to follow an earlier decision of Niamatullah J. that a document which amounts to nothing but an acknowledgment of a previous debt may be made the basis of a suit on the ground that an acknowledgment implies a promise to pay. They held that an acknowledgment of a debt does not amount to a supersession of the debt acknowledged. It only confirms the older debt.

In my judgment this is the correct view, and I prefer the view of Murphy J.C. rather than that expressed in later decisions of the Court. I hold that a mere acknowledgment cannot be made the basis of suit.

(1) I.L.R. 52 Bombay 521. (2) I.L.R. 35 Allahabad 27

It remains to consider whether the acknowledgment in the present case is a mere acknowledgment. I consider that it is. It contains no promise to pay. There is mention of interest in the heading, but there is no express mention that interest at this rate is to be charged on the amount stated in the khata. It is admitted that the rate of interest mentioned is the rate which has been charged on the old debt and which makes the total up to the amount of Rs. 265-11-0 acknowledged.

I hold therefore that the suit cannot lie on this acknowledgment. Plaintiff must revert to his original cause of action namely the original debt or to such acknowledgment as does amount to a novation of contract. I set aside the decree of the trial Court. I consider that in the circumstances plaintiff should be given an opportunity to amend his plaint, and if he does so within one month from the date of this order upon such order as to costs as the trial Court may deem proper, the suit should proceed on the amended plaint.

It is not necessary for me to give any finding on the question raised relating to the award of interest contained in the claim.

Applicant must have his costs in this Court.

Application accepted.

BEFORE MR. E. WESTON I. C. S.

Het Ram Jeth Mal, Firm ... .Judgment debtor—Appellant.

Versus

Firm Tulsi Ram Ram Swarup.... ....Decree Holder—Respondent.

Civil Second Appeal No. 56 of 1934, decided on March 4, 1935, against the decree passed by the Additional District Judge, Ajmer, on June 27, 1934.

Civil Procedure Code—S—39 (2)—Jurisdiction of Subordinate Courts.

The Subordinate Court to which a decree is transferred must be a court which would be competent to execute the decree as an original court, that is to say it must be a court which has pecuniary jurisdiction to pass such a decree.

Ajmer Court's Regulation (1 of 1877)—S. 7 and Ajmer Courts Regulation (IX of 1926)—S 9—Authority to invest Subordinate Judges with jurisdiction in suits exceeding Rs. 10,000/-.

A general order, dated 1st December 1923, had been issued under Section 7 of Regulation I of 1877 investing the Subordinate Judge, Beawar, with powers to dispose of original suits above the value of Rs. 10,000/-

The new Regulation contains no clause providing that powers existing under the old regulation shall continue and be deemed to have been conferred by appropriate section of the new Regulation. Under the new Regulation the Commissioner or District Judge has no authority to invest a Subordinate Judge with jurisdiction in suits exceeding Rs. 10,000. This authority can be exercised only, by the Chief Commissioner under Section 9.

Practice-Jurisdiction.

When a Regulation (or Act) is repealed, parties have no substantive right that the jurisdiction which a Judge or Court exercised under the repealed Regulation (or Act) continues under the new Regulation, *4 A. M. L. J. 7* **Not applicable.**

Mr. *Hira Lal Jain*—For Appellant.

Mr. *Nathu Lal Ghiya*—For Respondent.

Judgment.—The only question in this appeal is whether the Subordinate Judge, Beawar, has jurisdiction to execute the decree the amount of which admittedly exceeds Rs 10,000.

The decree which is of the Bombay High Court was transferred for execution in the year 1924 to the Court of the Commissioner, and was again transferred in the same year to the Court of the Subordinate Judge, Beawar. The transfer appears to have been made immediately on its receipt from Bombay, and to have been made as an ordinary matter of routine under section 39 (2) Civil Procedure Code. The

point has not been raised before me but the wording of subsection (2) of section 39 appears to shew that the subordinate Court to which a decree is transferred must be a Court which would be competent to execute the decree as an original Court, that is to say it must be a Court which has pecuniary jurisdiction to pass such a decree.

It has been suggested that the order of transfer by the Commissioner gave the Beawar Court pecuniary jurisdiction, but on reference to the Commissioner's office I find that a general order dated 1st December 1923 had been issued under section 7 of Regulation 1 of 1877 investing the Subordinate Judge, Beawar, with powers to dispose of original suits above the value of Rs. 10,000.

When the transfer was made the Beawar Court undoubtedly had jurisdiction to execute the decree.

Regulation I of 1877 was repealed and displaced by the Ajmer Courts Regulation IX of 1926 This latter enactment contains no clause providing that powers existing under the old Regulation shall continue and be deemed to have been conferred by appropriate section of the new Regulation. Under the new Regulation the Commissioner or District Judge has no authority to invest a subordinate Judge with jurisdiction in suits exceeding Rs. 10,000. This authority can be exercised only by the Chief Commissioner under section 9.

It is not suggested that the Subordinate Judge, Beawar has been invested either by name or by office with additional jurisdiction under section 9. It is admitted before me that the Subordinate Judge is not competent to dispose of civil suits of value exceeding Rs. 10,000, and also that he is not a court of competent jurisdiction to which decree above Rs. 10,000 can be transferred for execution.

It is urged however that as the Subordinate Judge or rather one of his predecessors exercised jurisdiction in the execution proceedings before Regulation IX of 1926 came

into force, he or rather his court retains jurisdiction in this case notwithstanding the fact that the special powers of the Court in general have ceased to exist.

In the case *Modu Lal* v. *Mohan Lal*[1] it was held following earlier decisions of this Court that although amendments to laws of procedure apply to pending cases, a substantive right such as a right of an appeal in a pending case is not affected by amendment of statute. The decisions follow the pronouncement of Lord MacNaughten in *Colonial Sugar Refining Co.* v. *Irving*, "In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal".

I do not consider that these decisions lay down that a litigant has a vested right to the continuance of the tribunal before which he originally seeks his relief. If the Commissioner's order of the year 1923 had given special jurisdiction to the Subordinate Judge by name I do not consider that on transfer of that particular Subordinate Judge litigants would have been entitled to require that his successor should be given the same special jurisdiction. The special jurisdiction of the Beawar Court was abolished by the Regulation 1926, but there seems no reason to hold that it could not have been abolished under the old Regulation by order of the Commissioner who granted it. Further under section 26 of the old Regulation the Commissioner could withdraw any suit of the Beawar court to his own file. In fact the result of allowing the present appeal, namely that the decree holder must seek execution of his appeal in the District Court is a result which would follow proper orders passed under the old Regulation.

In the circumstances the plea of substantive right must fail, and I hold that the rulings of this Court relied upon are not applicable to the facts of this case.

(1) 4 A. M. L. J. 7.

I allow the appeal and set aside the order passed by the Beawar Court as made without jurisdiction. A large amount is to be recovered on the decree, and I think it will be just to order the parties to bear their own costs throughout.

Appeal Accepted.

BEFORE MR. E. WESTON, I. C. S.

Kanhiya Lal .... Appellant.

Versus

Mst. Phulan and *others* .... Respondents.

Civil Second Appeal No. 67 of 1934 decided on February 25, 1935, against the decree passed by Additional District Judge, on December 18, 1933 in Appeal No. 75 of 1931.

Limitation Act—Section 5—Pendency of Review application good ground if prosecuted with proper diligence.

A review application may be good ground for extending limitation, but clearly it can be a good ground only when it has been prosecuted with proper diligence.

Court Fees Act—Schedule I Article 5—Ad valorem stamp duty.

Ad valorem stamp duty is necessary on a Review application.

Messrs. *Srilal Agarwal* and *Swarup Narain Agarwal*
—For Appellant.

Messrs. *Jyoti Swarup Gupta* and *Motilal Malaviyar*
—For Respondents.

Judgment—A preliminary objection has been taken that the appeal is time barred It has been filed nine months after the passing of the decree by the lower appellate Court. Appellant seeks to exclude under section 5 of the Limitation Act the time occupied in prosecuting a review application from the judgment and decree now appealed against.

I accept that a review application may be a good ground for extending limitation, *Mohanlal* v. *Khemchand*[1] but clearly it can be a good ground only when it has been prosecuted with proper diligence.

The review application now relied upon was presented stamped with a one rupee stamp only. Under article 5 of schedule 1 of the Court Fees Act ad valorem stamp was necessary. The proceedings shew that at the outset the attention of applicant's pleader was drawn to the fact that the application was not properly stamped. Proper stamp was not paid and notice was issued only subject to the objection as to stamp being raised. The application finally was dismissed for want of proper stamp and no suggestion has been made that this dismissal was improper.

Even if the initial non-payment was due to bona fide mistake, although I find it difficult to accept that it could have been, I cannot accept for a moment that it continued to be so after the point was raised when the application was filed in Court. I must hold that the review application was not prosecuted with proper diligence, and I am unable to exclude under section 5 of the Limitation Act the time between the date when it was filed and the date when it was dismissed.

The present appeal must be dismissed with costs as barred by limitation.

Appeal Dismissed.

(1) 1934 A. M. L. J. 30.

BEFORE MR. E. WESTON, I. C. S.

Prem Sukh .... Plaintiff-Appellant.

Versus

Bansi Dhar and *others* .... Defendants-Respondents

Civil Second Appeal No. 53 of 1934, decided on April 8, 1934, against the decree passed by the Additional District Judge, Ajmer, in Appeal No. 77 of 1931 on April 30, 1934.

Hindu Law—Alienation—Manager—Necessity—Alienee must prove necessity or bona fide inquiry as to legal necessity.

A person who claims title under an alienation from a guardian of an infant must prove that there is legal necessity for it, that is, such pressure on the estate at the time the loan was taken or the alienation made as just fied the act of the guardian, he can also protect himself by proof of bona fide inquiry, and if the fact of such inquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title, *20 C. L. J. 23* Foll.

Messrs. *Raghunath Agarwal* and *Mohan Lal Capoor*—For Appellant.

Rai Bahadur *Ram Kishore* (*of Delhi*) and Messrs. *Jyoti Swarup Gupta* and *Abdul Rashid*—*For Respondents.*

Judgment—The present suit was filed by one Prem Sukh (since deceased) for recovery of Rs. 2500 on the basis of a mortgage, dated 23rd June 1924, passed by defendant Har Narain on his own behalf and on behalf of his three minor brothers, defendants 2, 3 and 4.

Har Narain admitted execution but pleaded that the consideration was Rs. 500 only and that the money was not borrowed for family necessity but for his own purposes. The minor defendants by their guardians ad litem pleaded that they were not bound by the mortgage which was passed by Har Narain for his private needs. It was also pleaded that

Har Narain had sold his rights to the minor defendants. It is not disputed that the property mortgaged was joint and ancestral and that at the time of mortgage Har Narain was the manager of the family consisting of himself and his minor brothers.

The First Class Sub Judge, Nasirabad, decreed the claim holding that the consideration of the mortgage was Rs. 2,000 as stated in the bond, that the money had been borrowed to pay off a decretal debt due by defendant's father to one Sheo Dutt, that the payment of an ancestral debt is legal necessity and when, as in this case, a decree had been passed the necessity was all the more pressing, that the debt of Sheo Dutt was paid off within seven days of the passing of the mortgage deed and that therefore the minor defendants are bound by the mortgage. The sale deed by Har Narain which was passed after the mortgage was executed was held not to affect the mortgagee's rights and it was also held to be clearly fictitious and collusive. The claim therefore was allowed and a preliminary decree for sale passed.

In appeal the Additional District Judge while holding that the consideration of the mortgage was Rs. 2,000 held that it was not proved that plaintiff Prem Sukh before advancing the mortgage money made inquiries into the legal necessity for the loan and satisfied himself that the manager (Har Narain) was acting for the benefit of the estate. This the learned Additional District Judge considered the main point in the case requiring determination. He also held that no convincing evidence had been led to shew that the family was in such straitened circumstances that it could not have met the pressing necessity of avoiding sale of the property (in execution of the decree of Sheo Dutt). He also considered that the decree of Sheo Dutt was not only against the father of defendants but against the father's brother, and it had not been shewn that the brother was unable to pay. He remarks:

"I am therefore not satisfied that it should be presumed that there was a family necessity for the loan and that inquiries had been made by the lender into the monetary condition of the family before he had advanced the money to Har Narain."

"It was further argued that no question of making any inquiries really arose as the money borrowed was in fact used to ward off a family necessity. I do not agree with the argument which I consider to be fallacious. I think that the law requires that it should be established beyond all reasonable doubt that due inquiries were made before the loan was given and it is immaterial whether the pressure on the estate was real or unreal so long as the lender acted bona fide."

The decree of the trial Court was modified by allowing a decree only against the share of Har Narain. It was accepted that the sale deed said to have been passed by Har Narain did not affect the rights of the mortgagee.

Plaintiff Prem Sukh has now filed this second appeal and he claims that the order of the trial Court should be restored.

I will consider first the legal point arising from the portion of the judgment of the Additional District Judge quoted above.

I understand the view taken by the learned Additional District Judge to be that in suits on alienations made by a manager of a Hindu joint family the question of the existence of legal necessity is immaterial and the only question to be considered is whether the lender or alienee made proper inquiry that legal necessity existed and acted in good faith. In other words that although legal necessity may be proved to have existed, yet the lender cannot succeed in his claim unless he proves that he made proper inquiry as to the existence of that necessity.

With this view I am unable to agree.

The text of the Mitakshara usually quoted as the foundation of the law allowing alienation by a manager is given by Mr Mayne as,

"Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress, for the sake of the family and especially for pious purposes."

In Hanooman Persad's case quoted by the Additional District Judge it was laid down:

"The power of the manager for an infant heir (the case was one of a Hindu widow) to charge an estate not his own, is, within Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate, but when in the particular case the charge is one that a prudent owner would make in order to benefit the estate the bona fide lender is not affected by the previous mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

This case is also the leading case on the equitable doctrine relied upon by the Additional District Judge whereby a lender who has made proper enquiry and acts under the bona fide belief that legal necessity exists is protected. The pertinent remarks in the judgment are:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire and act honestly the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and they do not think that in such circumstances he is bound to see to the application of the money.

Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution and is himself deceived."

I am not aware that it has ever been suggested that this principle is based upon the ancient texts of Hindu law or is other than an equitable principle which their Lordships of the

Privy Council considered essential not merely to protect the bona fide lender, but also to ensure that in times of necessity the power of the manager to take steps to safeguard the estate is not fettered by the reluctance of lenders to advance, when their chances of recovery would be contingent upon proof of facts which in many cases could not be within their personal knowledge, and for which they would have to rely largely upon the assurances of their borrower.

Although in Hanuman Persad's case their Lordships considered that on the facts of that case the plaintiff in order to succeed must establish that bona fide inquiry was made, it was not laid down in that case that the equitable protection of the bona fide lender has replaced the original rule of Hindu law which permits the alienation.

I have been referred to a large number of rulings by the various High Courts subsequent to Hanooman Persad's case In certain of these cases on the facts it was held that the lender must prove proper inquiry It is not necessary to refer to these cases in detail In no case has it been held that where legal necessity has been proved the lender cannot succeed without further proof of proper inquiry made at the time of the loan Section 38 of the Transfer of Property Act does not support the view that inquiry is the one essential, and this section is said to be based on the Hanooman Persad decision

The correct position may be stated as follows

"A person who claims title under an alienation from a guardian of an infant must prove that there is legal necessity for it, that is, such pressure on the estate at the time the loan was taken or the alienation made as justified the act of the guardian he can also protect himself by proof of bona fide inquiry, and if the fact of such inquiry is established, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title" (20 C. L. J. 23=A. I. R. 1915 Cal. 141).

Coming to the facts of the present case, Prem Sukh who advanced the money died during the pendency of the suit and did not give evidence. His widow also was not examined and presumably has no personal knowledge. The mortgage deed does not recite the purpose for which the money was advanced, and the evidence of the one witness Ramlal who states that he negotiated the loan at the request of Har Narain who told him that he had to pay off the decree of Shiv Dutt clearly is not evidence sufficient to prove that Prem Sukh made proper inquiry into the legal necessity for the loan.

It is in fact the case of appellant that although inquiry has not been proved the fact of legal necessity has been established.

It has been found by both Courts below that the consideration of the suit mortgage Rs. 2,000 was utilised to pay off the decree of Shiv Dutt.

Ex. P/3 is a copy of the execution application made by Shiv Dutt and his sons. It is dated 26th May 1924. It shews that the decree was passed on 29th April 1924 and was passed against Har Narain on his own behalf and on behalf of his minor brothers and also against Panna Lal their uncle. Execution was not sought against Panna Lal but against the immoveable property of Har Narain and his minor brothers.

It is admitted by Bansi Dhar one of those brothers in his evidence in the present suit that their house was attached and that the attachment took place before the date of a document Ex. D/15. This is the document between Shiv Dutt or his sons and certain relations of Har Narain whereby those relations purported to purchase the decree. It is dated 30th June 1924. The suit mortgage is dated 23rd June 1924. In view of Bansi Dhar, admission I do not think there can be any doubt that attachment took place before 23rd June 1924 or at least that on 23rd June 1924 the fact that attachment had

been applied for was known to Har Narain. It has not been shewn that Har Narain and his brothers were not bound by the decree of Shiv Dutt. Although the decree was also against Panna Lal, the decree holder was entitled to proceed and actually proceeded against the joint property of Har Narain and his brothers I am unable to agree that there was no danger to the estate to be avoided because if the property had been sold Har Narain and his brothers might have had a cause of action against Panna Lal for contribution. The danger to the estate to be avoided was the sale in execution. It is not suggested that Panna Lal had any share in the property. Sale of the property could be avoided only by satisfying the decree. As held in Hanooman Persad's case the actual pressure on the estate, the danger to be avoided or the benefit to be conferred upon it in the particular is the thing to be regarded.

It must be accepted that if, at the time of the suit mortgage there were not funds in the possession of Har Narain sufficient to meet the decree of Shiv Dutt then the alienation or mortgage to Prem Sukh was justified by legal necessity.

It is of course for plaintiff to prove that such a condition of affairs in fact existed.

At this stage I may comment upon the document D/15 already referred to. The device whereby, instead of recording satisfaction of the decree of Shiv Dutt, an assignment of the decree in favour of relations of the defendants was taken, may have been adopted to retain a right of execution against Panna Lal or it may have been adopted to obscure the connection of the suit mortgage with the satisfaction of the decree. As already mentioned both Courts below have found that the consideration of the suit mortgage was utilised in paying off the decree and the evidence led to shew that Ex. D/15 was a genuine transaction must be taken as false in view of this finding. The subsequent execution proceedings taken on this assignment are also open to suspicion as being creation of evidence.

It is claimed that at the time of the suit mortgage Har Narain must have been in possession of funds. It appears that his father who died in February 1923 was a Public Works Contractor, and a number of bills dated March 1923 purporting to shew Rs. 7,000 or 8,000 as due to him have been produced. Assuming that these amounts were recovered by Har Narain, on his own evidence he misspent them. No doubt as held by the Courts below Har Narain is not a person upon whose word reliance should be placed but there does not seem to be any reason to believe that he was any better than the improvident and dishonest manager he makes himself out to have been. He is supporting other defendants in this suit. The suit mortgage was not passed until fifteen months after the dates of the P. W. D. bills in the name of his father. It is said that after his father's death he continued as a contractor. Certain of the bills produced are in his name and are of dates nearly a year after his father's death. They are for small amounts and suggest that at the time Har Narain was in a very small way of business.

There is one circumstance which throws light upon the position of Har Narain. This is a sale deed Ex. D/18 dated 15th December 1924 by which Har Narain sold to his brothers his one quarter share in the joint immoveable property for Rs. 1,000. As a device to avoid the suit mortgage it appears too feeble to have commended itself to the persons who were responsible for Ex. D/15. If it is taken to be a genuine transaction it would appear either that the relations considered that Har Narain should severe all connection with his brothers and the estate, or that Har Narain was responsible for it and the natural inference then would be that he was in need of money. The consideration is said to have been a debt recovered from one Choth Mal, not surplus cash in the estate.

In my opinion this transaction gives substantial support to Har Narain's evidence that he squandered the assets of the

estate Taking this together with the evidence of the witness Ram Lal and the fact that the consideration was used to meet the decretal debt there seems to me evidence sufficient to justify the finding that at the time of the mortgage there were not in the possession of Har Narain funds sufficient to meet the decretal debt. In other words the legal necessity for the loan has been sufficiently proved. The necessity is not affected by previous mismanagement of the estate

On this finding plaintiff is entitled to succeed. I allow the appeal and restore the decree of the trial Court. Defendant must bear plaintiff's costs throughout.

Appeal allowed.

BEFORE MR E WLSTON, I. C. S.

Ram Sahai and *others* .... Appellants.

Versus

Crown .... Respondent.

Criminal Appeals No 10 to 12 of 1934, decided on January 4, 1935, against the order passed by Additional District Judge on November 1, 1934 in Sessions Case No 8 of 1934.

Evidence Act—Section 27—Scope

Section 27 makes admissible only statements by an accused to the police as a consequence of which facts are discovered This does not mean that any statements made by an accused antecedent to discovery are admissible

Criminal Trial—Evidence of approver.

Where evidence is given under inducement of pardon, the approver is likely to give evidence incriminating the persons who are accused.

Mr *Abdul Rashid*—For Appellant

K. B. *Abdul Wahid Khan*—For Crown.

that the shop was broken into during the night and two blankets, a bathing costume, five pullovers, one jersey and some children's clothes were stolen

It may be accepted that the two shops were broken into and that articles as described were stolen.

In the course of inquiry by the Police into these and other similar offences, Head Constable Gauri Shanker, was sent to Agra and met there witness Nand Kishore who has been made an approver in the case. As a result of information given by Nand Kishore, Gauri Shanker telephoned to Ajmer that accused Ram Sahai's house there should be searched. Mr. Mata Din, the investigating Police officer, states that Ram Sahai's house was searched but nothing was found. A day or two later, apparently on 14th January, Ram Sahai was produced before the Police at Ajmer. After being interrogated Ram Sahai is said to have taken the Police to his house, and from an empty shop near it to have produced a trunk containing a number of articles among which were exhibits B 1, 3, 5, 10, 13, 14, 15, and 16.

The evidence relating to this production of property is extremely unsatisfactory. Mr. Mata Din states that he did not notice from where Ram Sahai brought the trunk, while the panch witness examined, Williams states that it was the Police who brought out the trunk, although before the Committing Magistrate he said Ram Sahai did so.

Ashiq Mohammed has identified all the articles to be his. In particular he identified a table cloth B 13 which he says was not for sale but for his private use He also states that all these are articles mentioned in Ex. S 5.

Accused Pyarelal was arrested at Ajmer some time before 20th January while accused Rajjumal known as Bengali was arrested at Agra about 2nd February. When arrested Bengali, as he admits, was wearing the sweater or pullover

Ex. C 2, and according to Mohammed Kassim Ex. C 2 is similiar to the five pullovers stolen from the shop of Alla Rakha. Rajju Mal in his statement alleges that this was given to him by the informer Nand Kishore.

It is in evidence that Nand Kishore produced a fairly considerable amount of property at Agra on 2nd February and witness Mazahir states that the property including Exhs. B 1, 6, 7, 11, 15, 17 (?), and C 1. Exhs. B. 1 to B 16 are identified by witness Ashiq as already described.

In March Nand Kishore turned approver and it is upon his evidence that the prosecution mainly relies.

I have omitted evidence of confessional statements said to have been made by Ram Sahai to the Police during the investigation. It must be emphaised that section 27 of the Evidence Act makes admissable only statements by an accused to the Police as a consequence of which facts are discovered. This does not mean that any statements made by an accused antecedant to discovery are admissible. When an accused person himself takes the Police to a place and himself produces property it is difficult to imagine how any statement of his leads to the discovery, and in the present case some at least of the statements attributed to Ram Sahai appear to have been made after he is said to have produced the trunk.

Nand Kishore's evidence is that he and accused Pyare Lal had agreed to come to Ajmer from Agra to commit thefts, and they met at Ajmer shortly after Diwali. He then met Ram Sahai who has lived at Ajmer for some years, Bengali (Rajju Mal) and several others. He describes the housebreaking at Cap House which he says was committed by seven persons including himself and the three accused, and says that on the following night the same seven persons broke open

another shop. In the second offence he says articles B 9 and B 14 fell to Pyarelal or Ram Sahai and article C 2 (the pullover) fell to Ram Sahai who gave it to Bengali.

It may be mentioned again that articles B 1 to B 16 are said to have been stolen in the first offence.

A banya witness, Kalyan, has been examined who states that he had bought a quantity of cigarettes from Nand Kishore.

On Nand Kishore's statement together with the production by him of property at Agra, it may be accepted that he was one of the persons responsible for the two housebreakings.

His evidence that the three accused also were concerned in the offences is to be regarded with great caution. It is evidence given under inducement of pardon, and there can be little doubt that in such circumstances the approver is anxious to give evidence incriminating the persons who are accused. It is true that in the present case the three accused appear to have come under suspicion by reason of Nand Kishore but the evidence as to that part of the Police inquiry is and must remain obscure There is certain evidence of association of the three accused with Nand Kishore such as the evidence of witness Ratanlal and the statements of accused themselves.

Association with an informer proved to have been concerned in a number of housebreakings is a suspicious circumstance particularly if that association is proved at Ajmer where the offences were committed and certain of the accused are strangers to Ajmer, but I must agree with the opinion of the assessors that this is not sufficient corroboration of the informer's evidence that the association extended to the crimes committed. The evidence of the alleged production by Ram Sahai of property not from his house is too unsatisfactory to have any value, while Rajjumal's

explanation of his possession of the pullover is not impossible and is consistent with the association between him and the approver upon which the prosecution relies.

The case against accused undoubtedly is one of strong suspicion but strong suspicion is not enough even against the associates of a guilty person.

I must allow the appeals and set aside the convictions and sentences. The appellants are acquitted.

Appeals Accepted.

BEFORE MR. E. WESTON, I.C.S.

Gainda Lal .... Defendant-Applicant.

Versus

Anup Singh .... Plaintiff-Opposite Party.

Small Cause Court Revision No. 150 of 1934, decided on March 4, 1935, against the order passed by the Small Cause Court, Ajmer, on October 13, 1934 in suit No. 1107 of 1934.

Civil Procedure Code—Section 11—Mere mention of a debt without claiming a set off does not bar a separate suit.

Where plaintiff was not bound to counter—claim in the earlier suit, the mere mention of a debt (alleged to be due to the defendant from the plaintiff) in the written statement, without attempt to convert the matter into a counter claim cannot bar a separate suit.

Mr. *C. Jacob*—For Applicant

Mr. *Anandi Prasad Bhargava*—For Opposite Party.

Judgment—This is a suit for an amount of Rs. 64 said to have been advanced by plaintiff to defendant, his servant. In an earlier suit defendant had sued plaintiff for an amount of Rs. 48 odd as arrears of wages. In his written statement in that suit present plaintiff pleaded the present advance but paid no Court Fee on set off or counter claim and the Court declined to go into the question.

It is urged that the present suit is barred by res judicata. Plaintiff was not bound to counterclaim in the earlier suit, and mention of the present debt in the written statement without attempt to convert the matter into a counter claim cannot bar a separate suit.

On the merits the debt appears sufficiently proved although an acknowledgment passed by defendant is said to have been destroyed by fire.

The application is dismissed with costs.

Application dismissed.

BEFORE MR. E. WESTON, I C.S.

Ganeshilal Mannalal, Firm .... Plaintiff-Applicant.

Versus

B B & C.I Railway Company .... Defendant, Opposite Party.

Small Cause Court Revision No. 106 of 1934, decided on February 27, 1935 against the order passed by the Small Cause Court, Beawar, on April 20, 1934, in suit No. 1292 of 1933.

Railway Act—Risk Note Form H—Scope

Under Risk Form H a plaintiff can succeed only on proof of misconduct of the servants of the Railway administration The proviso in Risk Form H is not consistent with the substantive clause laying down the conditions of liability. The proviso is likely to mislead persons seeking their remedy under the form.

Civil Procedure Code—Order 6, Rule 17—Amendment due to unsatisfactory wording in Risk Form H—No rights accrued to defendant by limitation Amendment allowed to enable plaintiff to base his claim upon only ground on which he can succeed.

Plaintiff originally alleged negligence and misconduct of Railway administration Subsequently he sought amendment to substitute the word 'servants' for 'administration'.

Held, the Railway Company should not obtain advantage from unsatisfactory wording in the Risk Form and unless the amendment would defeat a right which has accured by limitation, a plaintiff should be allowed to amend his plaint to base his claim upon what has been held to be the only ground upon which he can succeed.

Mr. *Kishan Swarup Mathur*—For Applicant.
Sardar Bahadur *Bhagwan Singh*—For Opposite Party.

Judgment—Plaintiff applicant filed suit No. 1292 of 1933 in the Court of Small Causes, Beawar, to recover compensation for damages caused to cement conveyed by the defendant Railway Company. In the plaint applicant claimed that the damage was due to the "defendant company's administration's wilful negligence and misconduct".

The Company in their written statement pleaded that the cement was consigned under Risk Form H which indemnifies the Railway Company against all responsibility from loss, destruction, deterioration or damages to goods consigned thereunder except on proof that such loss, damage etc. arose from the misconduct of the Railway Administration's servants. They denied that there had been any such misconduct.

Issues were framed, and the issue referring to misconduct was framed in accordance with the plaint in the Form.

"Was there any misconduct or negligence on the part of the Railway Administration?"

Plaintiff then presented an application for amendment of the plaint stating that by the word "administration" he meant to refer to the servants of the defendant company, and that he should be permitted to amend the plaint by substituting the word "servants" for "administration".

The amendment was opposed and was disallowed by the Court on the ground that the amendment sought would alter the fundamental character of the suit. As plaintiff declined to proceed on the existing pleadings the suit was dismissed.

Plaintiff now comes in revision with the prayer that the amendment should have been allowed.

The distinction between misconduct of the Railway Administration and misconduct of the Railway Administration's servants was pointed out by Norman J.C. in Small Cause Court Revision No 13 of 1933[1] but the main point in that decision was that under Risk Form H a plaintiff can succeed only on proof of misconduct of the Administration's servants As discussed in that decision the provision in Risk Form H is not consistent with the substantive clause laying down the conditions of liability and I think this provision is likely to mislead persons seeking their remedy under the form. The Railway Company should not obtain advantage from unsatisfactory wording in the Risk Form and unless the amendment would defeat a right which has accrued by limitation a plaintiff should be allowed to amend his plaint to base his claim upon what has been held to be the only ground upon which he can succeed.

S. B. Bhagwan Singh for the Company has relied upon *Shibkristo* v *Abdool*[2] but this was a case where a plaintiff wished to alter a claim of letter from hirer into a claim of principal from agent.

It has not been suggested that at the time the present amendment was sought the suit in its amended form would have been barred by limitation, and it is not very clear what the learned Judge had in mind when saying that a right had accured to defendant.

I allow the application and set aside the order of the Lower Court. Plaintiff should be permitted to amend the plaint as prayed by him, and the suit should then be disposed of on its merits. Plaintiff should bear the costs of the other side in the Lower Court on the application to amend. Costs in this Court to be costs in the suit.

Application allowed.

(1) 6 A. M. L. J. 5. (2) I. L. R. 5 Cal. 622.

Law Points in Certain Cases.

BEFORE MR. E. WESTON, I.C.S.

**King Emperor* v. *Mohammad Bux Alias Wafadar.*

Criminal Revision No. 50 of 1934, decided on February 21, 1935, against the order passed by the Additional Sessions Judge, Ajmer, in Criminal Appeal No. 66 of 1934.

Criminal Trial—Proof of search—Evidence Act, S. 152.

It is not enough for persons who have been present at searches by the Police to come into the witness box and state that lists prepared at the search bear their signatures. These lists generally are not substantive evidence. The prosecution should elicit from the witness his personal account as to what happened at the search and what was found. If his memory is defective as to what exactly was found, he may be allowed to refresh it under section 159 of the Evidence Act by reference to any list made in his presence at the time of search and read by him at that time.

Criminal Trial—Quantum of sentence.

The Penal Law of India does not prescribe any fixed standard of punishment except for certain exceptional offences and a wide discretion as to the punishment to be given is allowed. In exercising this discretion a criminal court should consider the nature of the offence committed, the circumstances under which it was committed, the probability or improbability that it was an isolated act committed without premeditation and the general character and position of the accused in relation to the offence he has committed.

Dangerous Drugs Act (IX of 1930)—Deterrent sentence, Criminal Trial.

Traffic in cocaine with its terrible results in creating drug addicts should be dealt with by deterrent sentences in appropriate cases.

Khan Bhadur Abdul Wahid Khan—For Crown.

Mr. Mohan Lal Capoor—For Opposite Party.

*Raji, Mst. v. Chitar.

Small Cause Court Revision No. 131 of 1934, decided on March 14, 1935, against the order passed by the Judge, Small Cause Court, Ajmer, on 27th October 1934, in Execution Case No. 4863 of 1933.

Civil Procedure Code—Order 20, Rule 11—Terms of decree cannot be altered without consent of decree-holder, Execution.

A Court has no jurisdiction to alter the terms of a decree without the consent of the decree-holder.

Civil Procedure Code—O 20, R. 11—No local enactment permitting instalments to agriculturist in Execution proceedings.

No local enactment appears to exist permitting instalments to be allowed in execution proceedings when the judgment-debtor is an agriculturist.

Mr. Devi Dayal Bhargava—For applicant.

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*Ghisulal v. Basti Mal and others.

Civil Appeal No. 63 of 1934, decided on March 4, 1935, against the decree passed by the Sub Judge, First Class, Beawar, on 30th January 1929, in Civil Suit No. 102 of 1927.

Ajmer Courts' Regulation (IX of 1926)—S. 12—Forum of Appeal is governed by the subject matter of suit and not subject matter of appeal.

Decree was for more than Rs. 5000/-. The appeal related only to an amount of Rs. 1000 - odd.

Held, in Ajmer the forum of an appeal is prescribed by the subject matter of the suit and not the subject matter of the appeal.

Mr. Ram Chand—For Appellant.

R. B. Mathanlal Bhargava and Mr. Moti Prasad Mehta—For Respondents.

*Gulab, Mst. v. Crown.

Criminal Appeal No. 18 of 1934, decided on March 12, 1935, against the order passed by the Additional Sessions Judge, Ajmer, on November 30, 1934 in Sessions case No. 12 of 1934.

Criminal Procedure Code—Section 401—In suitable cases of infanticide sentence may be reduced.

In England by statute of the year 1922 it has been enacted that when a woman, who has not fully recovered from the effect of giving birth to a child so that the balance of her mind is still disturbed, causes the death of such newly born child she may be found guilty not of murder but of the lessor offence of infanticide. The Indian Legislature has not followed the example of England and other European countries in this respect, but suitable cases can be dealt with under the powers conferred by section 401.

Mr. Madan Mohan Kaul—For Crown.

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*Chouth Mal Bhaironlal v. Bhopal Singh.

Miscellaneous Civil Revision No. 142 of 1934, decided on March 18, 1933, against the order passed by the Additional District Judge, Ajmer, on 22nd August 1934 in Appeal No. 113 of 1933.

Provincial Insolvency Act—Section 43—No automatic discharge on failure to apply,

An annulment does not take place *ipso facto* on expiry of the time fixed for applying for discharge.

Provincial Insolvency Act—S. 5 and S. 27 (2)—Court can extend time for discharge even after the expiry of the time originally fixed.

A court has power to extend time even after the expiry of the time originally fixed, *51 C. 337, 7 P. 375, 53 M. 288* **Foll.**

Mr. Raj Narain—For Applicant.

Mr. Brahma Dutt Bhargava—For Opposite Party.

BEFORE MR. E. WESTON, I. C. S.

Nathu .... Plaintiff—Applicant.

Versus.

Sarwan and *another*. .... Defendants—Opponents.

Small Cause Court Revision No. 136 of 1934, decided on April 4, 1935, against the judgment of the Judge, Small Cause Court, Ajmer, passed on November 6, 1934 in Suit No. 928 of 1934.

Limitation Act.—S. 20 —Entries on behalf of illiterate person must be signed by the person writing on his behalf.

In order to operate under S. 20 of the Limitation Act, entries said to have been made on behalf of an illiterate person must at least be signed by the person writing on his behalf.

Limitation Act—Article 74—When there is no default clause, limitation runs from the date when instalments fall due.

A bond contained no default clause making the whole amount due on default of one or more instalments.

Held, Plaintiff in fact was suing on a series of causes of action which had arisen when the instalments fell due and that the instalments which fell due within three years of the date of filing of suit were not barred by limitation.

Mr. Jawand Lal Dutt Choudhry—For Applicant.
Mr. Ram Swarup Mathur—For Opposite party.

Judgment.—Defendant in this case admittedly passed a bond on 20th October 1929 to plaintiff for an amount of Rs. 201 undertaking to pay in monthly instalments of Rs. 8, with a condition that if payments were not made each month interest at 12 per cent would be charged.

The suit was filed on 20th February 1934. Plaintiff claimed that defendant had paid certain instalments totalling Rs. 165. Defendant denied having made such payments and pleaded that the suit was barred by limitation. The trial

Court held that the payments could not renew limitation under section 20 of the Limitation Act and dismissed the whole suit as barred by limitation.

Plaintiff now comes in revision.

The payments totalling Rs 65 are entered on the bond and are said to have been written by witness Johri Lal who is the person who originally signed the bond on behalf of the illiterate defendant. The payments however were not signed by Johri Lal, and in order to operate under section 20 of the Limitation Act I think that entries said to have been made on behalf of an illiterate person must at least be signed by the person writing on his behalf. The signature of Johri Lal could be accepted as equivalent to the signature of the defendant, but I do not consider that the less formal writing of Johri Lal can be accepted as his writing.

The finding that the alleged payments do not renew limitation therefore, in my opinion, is correct.

When dismissing the whole suit the trial Court does not appear to have noticed that the last ten instalments under the bond fell due within three years of the date of filing of suit, and therefore could not be barred by limitation. The bond contained no default clause making the whole amount due on default of one or more instalments. Plaintiff in fact was suing upon a series of causes of action which had arisen monthly when the instalments fell due.

I must set aside the decree of the trial Court and grant plaintiff a decree for the ten monthly instalments which fell due on and between dates 20th February 1931 and 20th November 1931, together with interest at 12 per cent on each instalment from the date when it became due to the date of suit, and thereafter until the date of this order at six per cent. Defendant must bear his own costs and one half those of plaintiff throughout. Plaintiff will be entitled to further interest upon the amount decreed at six per cent until recovery

Revision Accepted.

BEFORE MR. E. WESTON, I. C. S.

Hira Lal .... Judgment-Debtor-Appellant.

Versus.

Nand Ram .... Decree-Holder-Respondent.

Miscellaneous Civil Second Appeal No. 98 of 1934, decided on September 16, 1935, against the order of the Additional District Judge, Ajmer, passed on October 19, 1934, in Miscellaneous Appeal No. 43 of 1934.

Civil Procedure Code (1908)—S. 7, S. 47 and S. 52—Extent of a legal Representative's lien on immoveable property of the judgment debtor—Small Cause Court can consider the question in proceedings under S. 52—But it has no jurisdiction to make a final determination on the question.

A Small Cause Court can consider the question of a legal representative's lien on immoveable property of the Judgment debtor for the purpose of determining whether execution should proceed, but it has no jurisdiction to make a final determination on the question.

Civil Procedure Code (1908)—S. 11—Previous enquiry under S. 52 by Small Cause Court no bar to fresh enquiry by Civil Court under S. 47.

A previous enquiry under S. 52 C. P. C. by a Small Cause Court on the question of the extent of a legal representative's lien on immoveable property of the judgment debtor is no bar to an enquiry on the same question by the Civil Court under S. 47 C. P. C.

Mr. Jyoti Swarup Gupta—For Appellant.
Mr. Shyam Swarup Mathur—For Respondent.

Judgment—The facts leading to this appeal are as follows.

Nand Ram respondent sued one Kishenlal in the Small Cause Court, Ajmer. During the pendency of the suit Kishenlal died and his son Hiralal, present appellant, was joined as his legal representative. Nand Ram obtained a decree for Rs. 300 odd.

The Small Cause Court held an inquiry under section 52 Civil Procedure Code, and a copy of the order passed, dated 7th November 1931, is on the record. It shews that Hiralal represented that the property he received from his father had been exhausted by payment of debt mainly by redemption of mortgages on the house he inherited. The Court held that the value of this house was Rs. 3,000, that Hiralal had received Rs. 400 from the sale of a machine. Deducting an amount of 2,400 accepted to have been paid in redemption of mortgage, the Court held that Hiralal had received property worth at least Rs. 800 together with some amount from shop goods. A finding was recorded that Hiralal had not satisfactorily accounted for the amounts he had received and that he had not shewn that he had no money to meet the decree. Execution was ordered to proceed.

The decree was then transferred from the Small Cause side to the regular side of the Court. Hiralal then opposed execution by sale of the house on the ground that he had a lien not only for Rs. 2,000, the amount allowed by the Small Cause Court, but also for another mortgage redeemed by him which the Small Cause Court had not allowed.

The executing Court held that the question had been concluded by the finding under section 52 Civil Procedure Code and that Hiralal had a lien to an amount of Rs. 2,000 only.

In appeal this decision was affirmed and Hiralal has now came in second appeal.

It is argued that the Small Cause Court had no jurisdiction to determine the amount of lien on the property. Section 7 of the Civil Procedure Code does not lay down that section 52 has no application to Small Cause Courts. It, however, provides that the provisions of the Code relating to the execution of decrees against immoveable property shall

not extend to Small Cause Courts. The question of the extent of a legal representative's lien on immoveable property of the judgment-debtor undoubtedly is a question to be determined in execution proceedings when execution is sought against that immoveable property, and I consider it must be held to be a question upon which the Small Cause Court had not jurisdiction to make a final determination. The Small Cause Court for the purpose of considering whether execution should proceed no doubt could consider the question, but on execution being issued, if the legal representative desired a determination by the executing Court he was entitled to demand it, and the previous inquiry would not bar him by res judicata.

I allow the appeal. The proceedings are returned to the executing Court with a direction to proceed with the execution after recording a finding on the amount of lien on the property to which the legal representative is entitled. Costs to be costs in the execution.

Appeal allowed.

BEFORE MR. E. WESTON, I. C. S.

Shanker Lal .... Decree-Holder-Applicant.

Versus.

Alla Noor .... Judgment-Debtor-Opposite Party.

Small Cause Court Revision No. 138 of 1934, decided on July 23, 1935, against the order of the Judge, Small Cause Court, Ajmer, passed on November 22, 1934, in Execution Case No. 5848 of 1933.

Decree.—Consent decree passed though party absent—Court executing such decree cannot go behind the decree.

Ordinarily the executing Court has not power to go behind the decree and refuse to execute it. In exceptional cases, such as where a decree has been passed against a person who was dead, it is open to the executing

court to treat the decree as nullity, which on the face of it, it is. An ex parte decree passed without recording evidence may be a decree which is liable to be set as de in appeal, but it is not a nullity.

Messrs Hem Chandra Sogani and *Basanti Lal Maheshwari*
For the applicant.

Judgment.—The facts giving rise to this application are briefly as follows.

Present applicant filed suit no. 1326 of 1930 in the Court of Small Causes, Ajmer, for recovery of Rs. 338 odd against present opponent and two others. Opponent and one of the other defendants did not appear and ex-parte orders were passed against them. When the suit came up for evidence the trial Court passed the following orders

"Parties present. Consent decree for Rs 320 with costs in full, Further interest at five per cent."

A decree was drawn up accordingly against all three defendants.

After an attempt to execute the decree against the defendant who was not ex-parte in the suit, the decree holder applied in July 1933 to execute it against present Opponent. Opponent appeared and claimed inter alia that the decree was a consent decree passed in his absence and was therefore a nullity against him. The executing Court made enquiries into his allegation that he was not present when the consent decree was passed, and accepting it held that the decree could not be executed against him. The execution application was dismissed

The decree holder has now come in revision and urges that the executing Court had no power to go behind the decree.

It is settled law that ordinarily the executing Court has not power to go behind the decree and refuse to execute

it[1]. In exceptional cases such as where a decree has been passed against a person who was dead it is open to the executing Court to treat the decree as the nullity which, on the face of it, it is. An ex-parte decree passed without recording evidence may be a decree which is liable to be set aside in appeal, but it is not a nullity.

Opponent had a number of remedies open to him. He could have applied to have the ex-parte decree set aside under Order 9, Rule 13. He could have appealed against the decree either as a decree passed ex-parte or as a consent decree improperly passed. In certain circumstances he could have filed a suit to set aside the decree.

The Madras case relied upon by the trial Court was a case of partition in which the circumstances were peculiar. I am not able to agree that it lays down that executing Courts have general power to enquire into the validity of decrees.

I must allow the application and set aside the order of the executing Court. The execution application should be restored to file and proceeded with on its merits. It will be open to opponent to seek such legal remedy as he may be advised. In the circumstances I make no order as to costs.

Revision accepted.

1. I. L. R. 44 Calcutta 627.

BEFORE MR. E. WESTON, I. C. S.

Mohan Lal .... Creditor—Applicant.

Versus.

Ratna .... Insolvent—Opposite Party.

Civil Revision application No. 147 of 1934, decided on September 13, 1935, against the order of the Additional District Judge, Ajmer, passed on September 11, 1934, in Miscellaneous Civil Appeal No. 125 of 1933.

Provincial Insolvency Act—S. 10—Question not whether debts can be satisfied immediately but whether assets locked up

The question is not whether the debts can be satisfied immediately out of the assets but whether the assets are so locked up that the debtor will not be able to pay at the times he is called upon to pay.

Ajmer Regulation III of 1914—S. 18—Agricultural land cannot be sold without Collector's sanction

Agricultural land cannot be sold without Collector's sanction.

Messrs. Raghu Nath Agarwal and *Debi Dayal Bhargava* For the applicant.

Mr. Parmatma Swarup—For the opposite party.

Judgment—In this case the Insolvency Judge rejected an application of Ratna opponent to be adjudicated insolvent on the ground that he had not shewn his inability to pay his debts.

In appeal the Additional District Judge considering that the test was whether the debts can be satisfied immediately out of the assets, and holding that it was clear that they could not be so satisfied, reversed the order of the Insolvency Judge and directed adjudication.

One of the creditors has now come in revision.

Under section 10 of the Provincial Insolvency Act a debtor seeking adjudication must put forward a prima facie case that he is unable to pay his debts. The Insolvency Judge, found that the assets exceeded the liabilities, and the learned Additional District Judge while remarking that the evidence was not very clear did not dissent from this finding.

The question then is not whether the debts can be satisfied immediately out of the assets, but whether the assets are so locked up that the debtor will not be able to pay at the times he is called upon to pay. I have not been

shewn evidence that at the time of his application there were warrants against the debtor or that he was under the immediate necessity of paying all or any part of his debts. The greater part of the assets is said to consist of agricultural land. Under local law this cannot be sold without the sanction of the Collector. It is not suggested that the permission of the Collector was applied for, nor has it been shewn that the Collector's permission will not be given in a case such as this.

Into the argument of the debtor's honesty I do not propose to enter very deeply. It is possible that he thinks that under the Insolvency Act he can obtain protection without loss of his land similar to that often given to encumbered estates with the additional advantage of having to pay only half his debts.

On the facts, as represented before me, I must allow the application, and reversing the order of the Additional District Judge I restore that of the Insolvency Judge. Applicant must have his costs in this Court from the respondent.

Application allowed.

BEFORE MR. E. WESTON, I.C.S.

Girdhari .... Applicant.

Versus.

Shamlat Committee, Beawar. .... Opposite Party.

Criminal Reference No. *61 of 1934*, decided on June *26, 1935*. made by the Special Additional Sessions Judge, Ajmer, *in his Court's* Revision Case No. 53 of *1934*, *decided on* November 24, *1934*.

Criminal Procedure Code (1898)—S. 133—Not applicable to Shamlat land—Common land not necessarily public land.

Proceedings under *Section 133* are not appropriate to cases of encroachment on *Shamlat* land. Common land is not necessarily public land.

K. B. Abdul Wahid Khan—For the Crown.

Order.—I must agree with the learned Additional Sessions Judge that proceedings under section 133 Criminal Procedure Code are not appropriate to cases of encroachment on Shamlat land. Common land is not necessarily public land and vague assertion of user by people of other villages is not proof of the public nature of the land. It appears that Girdhari has been in occupation for some time and the Shamlat Committee must take their proper remedy to eject him if they desire to do so. The proceedings accordingly are set aside.

BEFORE MR. E. WESTON I.C.S.

Ale Rasul, Diwan Syed ....Applicant.

Versus.

Bal Kishen, Seth and *others* .... Opposite Parties.

Miscellaneous Civil Revision No. 55 of 1935, decided on July 10, 1935, against the order of the Additional District Judge, Ajmer-Merwara, passed on January 2, 1935 in Miscellaneous Civil Appeal No. 48 of 1934.

Ajmer Courts Regulation (I of 1877)—S. 18—The word "shall" is mandatory and not directory—Court has no discretion to refuse.

The word "shall" is mandatory. When a question of the nature specified in S. 17 has been found to exist the District Court has no discretion to refuse to make the reference. *11 A. 501* Not applicable.

R. B. Mathan Lal Bhargava—For the applicant.
Mr Gauri Lal—For the opposite Party

Judgment.—This is a revision application from the order of the Special Additional District Judge, Ajmer, refusing to make a reference to the High Court of Allahabad under section 18 of the Ajmer Courts Regulation (I of 1877).

The order was made in execution proceedings which began as long ago as the year 1920. It is admitted that the procedure is governed by the Regulation of 1877 and not by the present Courts Regulation (IV of 1926.)

Certain objections to execution were dismissed by the First Class Sub Judge on 3rd September 1934 who held that the objections were barred by the principles of constructive res judicata. In appeal the Special Additional District Judge confirmed the order on the same grounds. An application then was made by the objector under section 17 of Regulation I of 1877 for reference to the Allahabad High Court.

In his order the learned Special Additional District Judge has conceded that he confirmed the order of the original Court on a question of law, that is to say, that there is a question of the nature specified in section 17 of the Regulation, but he declined to make the reference on the ground that his decision followed reported cases of the Allahabad High Court which have not been overruled, and that it would be absurd to ask for an opinion when opinion has already been expressed.

Now section 18 of the Regulation reads :

> "If the Court to which an application (for reference) is made..... considers that there is a question of the nature specified in section 17, it shall draw up a statement of the case.....and shall submit such statement together with the record of the case with its own opinion on such question to the High Court".

It is urged by opponents to the present revisional application that the word "shall" is not mandatory but merely directory. I am not able to accept this argument. It is true that many cases can be cited in which the word "shall" used in a number of statutes has been interpreted not to be

mandatory, but it seems to me clear that the legislature intended the word "shall" in section 18 of Regulation I of 1877 to be mandatory. Discretional powers of reference exist in the Civil Procedure Code under Order 46, Rules 1 and 6 whereby the Court "may" refer. I have been referred to Rule 7 of this order under which where certain erroneous exercise of jurisdiction or failure to exercise jurisdiction appears in the proceedings of a subordinate Court, the District Judge may, and if required by a party shall, submit the record to the High Court.

In a case *Madan Gopal* v. *Bhagwan Das*[1] it was remarked that the word "shall" in this rule, or rather in the section of the old Civil Procedure Code corresponding to this rule, is directory and not mandatory, but it is clear that the decision in this case was that the District Judge is not compelled to submit the record unless he considers that in fact there has been erroneous exercise or failure of exercise of jurisdiction. This case does not assist the argument of opponents.

I have considerable sympathy with the view taken by the learned Additional District Judge. I have had much to do in another Province with a similar Regulation whereunder parties had the right to demand a reference to the High Court, and I am aware of the abuse to which this right is liable to be put. I am not able however to accept that when the question of the nature specified in section 17 has been found to exist the Additional District Judge had any discretion under section 18 to refuse to make the reference.

I must return the papers with a direction that the reference should be made to the Allahabad High Court as required by present applicant. I make no order as to cost.

Revision accepted.

[1] I. L. R. 11 Allahabad 241

BEFORE MR. E. WESTON I.C.S.

Ghisu Lal .... Applicant.

Versus.

Shri Kishen and *another* .... Opposite Pary.

Civil Revision application No. 104 of 1935, decided on September 12, 1935, against the order of the Additional District Judge, Ajmer, passed on April 29, 1935, in Civil Appeal No. 90 of 1934.

Civil Procedure Code (1908)—O. 3, R. 4—Appointment of Pleader—Not restricted to parties or their authorised agents.

O. 3 R. 4 does not restrict the power of appointment of pleaders to parties or their authorised agents.

Mr. Raghunath—For Applicant.
Mr. Ghisu Lal -For Respondent No. 1.
Mr. Abdul Rashid—For Respondent No. 2.

Judgment.—The execution application which, I understand, applied for and resulted in the sale now sought to be set aside was filed before the rule came into force in Ajmer-Merwara restricting recognised agents to persons holding general powers of attorney from persons not resident within the local jurisdiction of the Court.

It is admitted in fact that the execution application was validly presented, and undoubtedly the Court had full jurisdiction to accept it and act upon it. The argument seems to be that by reason of the appearance of a pleader appointed by the presentor of the execution application at a time when by reason of the rule he had ceased to be recognised agent, the whole proceedings became tainted and the very foundation of the Court's jurisdiction disappeared. This argument seems to me to require no reply. I have not been referred to any specific acts done by the pleader appointed and I see no reason to inquire into them.

It has not been shewn that the pleader's appointment was invalid. Rule 4 of Order 3 does not restrict the power of appointment of pleaders to parties or their authorised agents.

There is no force in this application. It is dismissed with costs.

Revision Dismissed.

BEFORE MR. E. WESTON, I. C. S.

Durgah Khwaja Sahib ....Appellant.

Versus.

Jagdish ....Respondent.

Civil Second Appeal No. 94 of 1934, decided on July 28, 1935, against the decree of the Additional District Judge, Ajmer, passed on August 28, 1934, in Civil appeal No. 169 of 1933.

Civil Procedure Code (1908)—S. 11—Trial Court's decision would have operated as Res Judicata if no appeal had been preferred—But appeal filed—Appeal abated—Trial Courts decision operates as Res Judicata.

An unsuccessful party cannot avoid a decision from operating as Res Judicata by filing an appeal and allowing it to abate

Mr. Abdul Rashid—For Appellant.
R. B. Mithan Lal Bhargava—For Respondent.

Judgment.—The only point taken for appellant in this second appeal is on the question of res judicata. It is admitted that the earlier suit no. 49 of 1924 was filed by present plaintiff-appellant against present defendant, that the property is the same and that the same relief, namely a share in the produce, was claimed in the earlier suit. It was held in that suit that plaintiff is not entitled to a share in the produce but only to quit rent.

It is argued that because plaintiff filed an appeal against this decision and the appeal abated, because plaintiff did not join legal representatives of a party, there was no final decision and there can be no bar of res judicata. I do not think that the argument that an unsuccessful party can avoid a decision by allowing an appeal to abate calls for serious consideration.

The appeal is dismissed with costs.

Appeal dismissed.

BEFORE MR. E. WESTON, I. C. S.

Milap Chand .... Applicant.

Versus.

Crown .... Opposite party.

Criminal Revision Application No. 37 of 1935, decided on September 7, 1935, against the order of the Additional Sessions Judge, Ajmer, passed on June 21, 1935 in Criminal case No. 37 of 1935.

Criminal Procedure Code (1898)—S. 556—Magistrate issuing a warrant material in case—Magistrate should not try case.

If a Magistrate relies upon the presumption created by the warrant issued by himself and if in fact the warrant is material in the case, the Magistrate has tried a case in which he has already assisted the prosecution and such proceedings should be set aside.

The section is not a technical provision of law to be ignored at convenience.

Evidence.—Appreciation of—Informer's evidence to be regarded with caution:

Informer's evidence is to be regarded with caution whether his action has been prompted by revenge or by the more usual motive of reward.

Mr Sri Lal Agarwal—For Applicant.
K. B. Abdul Wahid Khan—For Crown.

Order.—Applicant has been convicted by the City Magistrate, Ajmer, under section 3 of the Public Gamling Act of using his pan shop as a common gaming house.

The Police are said to have obtained information from witness Bujraj Mal on 31st December 1934. A warrant was obtained from the City Magistrate on 3rd January 1935. On 5th January 1935 the Sub Inspector called Bujrajmal, gave him two marked rupees and sent him with two witnesses to Milapchand's shop. Bujraj Mal is said to have handed over the two rupees to be staked on digit no. 6, and at Milap Chand's request the transaction was marked on a slate by

one Ram Prasad who also was challaned but who was acquitted. Bujraj Mal then went to the Police and the shop was raided The two marked rupees were recovered from a cash box and two betting slips were found The slate also was attached but the figures on it were found to have been rubbed off.

The Magistrate has relied upon the presumption created by the warrant issued by himself, and if in fact the warrant is material in this case the Magistrate has tried a case in which he had already assisted the prosecution, and I should have no option but to set aside the proceedings. I must again bring to the notice of the Magistrate and of the Police that section 556 Criminal Procedure Code is not a technical provision of law to be ignored at convenience.

The learned Public Prosecutor argues however that in the present case the warrant may be ignored, but that there is still enough evidence on the record to justify the conviction.

It is suggested for applicant that the informer has a grudge against him because he was connected in the disposal of gold buttons stolen by a boy Mohan from applicant. This very probably is true. It is not very usual to find informers in this class of case who have given information from a sense of public duty, and the informer is a person whose evidence is to be regarded with caution whether his action has been promoted by revenge or by the more usual motive of reward

In the present case however the informer when sent with the marked coins was accompanied by two witnesses I have not been able to find any suggestions against their disinterestedness They both affirm that the informer was given the two rupees as stated by him and that the fact thereof was written on the slate at the request of Midpuri and They also speak of the betting slip having been found in the shop

Milapchand has admitted that the two marked rupees were given to him by the informer, and there can be no doubt that they were given on a wager as described. It is not suggested that this wager was a special transaction between Milap Chand and Bujraj Mal. It is not applicant's case that he was particularly friendly with Bujraj Mal.

In the circumstances although only one transaction has been proved I think it is sufficient proof that the shop was being used as a common gaming house. The betting slips found support this conclusion.

I therefore do not propose to interfere with the conviction in this case. The application is dismissed.

Revision dismissed.

BEFORE MR. E. WESTON, I.C.S.

Madan Lal .... Defendant-Appellant.

Versus.

Narain and *others* .... Respondents.

Miscellaneous Civil First Appeal No. 59 of 1935, decided on August 20, 1935, against the order passsed by the Additional District Judge, Ajmer, on April 23, 1935, in suit No. 10 of 1935.

Civil Procedure Code (1908)—O. 40, R. 1—Receiver may be appointed on consideration of allegations of waste and of prima facie merits of case:

A receiver may be appointed when it appears just and convenient, and for it to be just, some consideration not only of allegation of waste made against the person in possession but also of the prima facie merits of the case of the plaintiff in the suit is essential.

Mr. Sri Kishan Agarwal—For Appellant.
Messrs. J. L. Dutt Chaudhri and *Moti Lal Malavyar* and *Bishamber Nath Bhargava*—For Respondents.

Judgment.—This is an appeal from an order of the Additional District Judge appointing appellant (defendant no. 3) receiver of the property in suit.

The plaint is not very clear, but it appears to be plaintiff's case that the suit property is the separate property of his deceased father, and that he and defendants are joint tenants in that property by right of inheritance. He claims that he is in joint possession. The Additional District Judge remarks in his order that defendant no. 3 is in actual possession of the property.

When appointing defendant no. 3 as receiver the learned Additional District Judge did not consider it necessary to go into allegations made as to mishandling of the property by defendant no. 3 but considered it would be in the interests of all concerned if his apprehended activities are restricted.

Under Order 40, Rule 1, a receiver may be appointed when it appears just and convenient, and for it to be just some consideration not only of allegations of waste made against the person in possession but also of the prima facie merits of the case of the plaintiff in the suit is essential.

In a Bombay case[1] it was considered that a receiver should not ordinarily be appointed in a partition suit between members of a joint family.

The present suit is not merely a partition suit. Plaintiff has first to establish that a registered will passed by his father is invalid, and at present I understand his case has not proceeded beyond allegations in the plaint.

I understand that defendant no. 3 has given an undertaking; not to dispose of any of the suit property and at this stage plaintiff has not made out a case for more than such an undertaking.

I allow the appeal and set aside the order of appointment of receiver. Plaintiff must bear the costs of defendant no. 3 in this appeal.

Appeal allowed

1 13 I. C. 327.

BEFORE MR. E. WESTON I.C.S.

Brij Niwas Das .... Applicant.

Versus.

Abdul Hakim ....Opponent.

Miscellaneous Criminal Application No. 21 of 1935 ,decided on July 25, 1935, for transfer of Criminal case No. 40 of 1935 of the Court of Magistrate 1st class Beawar.

Evidence Act—S. 54—Magistrate should neither elicit nor record evidence of bad character :

During the examination of a witness Magistrate should neither elicit nor record statements made by the witness affecting the character of accused which undoubtedly are likely to cause prejudice to accused.

Criminal Procedure Code (1898) —S. 526 —Recording of irrelevant evidence which is likely to cause prejudice is sufficient to warrant a transfer :

Recording of irrelevant evidence which is likely to cause prejudice to accused is sufficient ground to warrant transfer of the case.

Mr. Jawand Lal Dutt Choudhry —For applicant.

Mr. Moti Prasad Mehra—For opponent party.

K. B. Abdul Wahid Khan—For Crown.

Judgment.—This is an application for transfer of a case of defamation pending against present applicant in the Court of the Extra Assistant Commissioner and Magistrate First Class, Beawar.

A number of grounds for transfer have been urged, of which only one deserves consideration, namely that by reason of the action of the Magistrate in questioning complainant and bringing on record in that examination statements damaging to the character of accused, accused has a reasonable apprehension that the Magistrate is prejudiced against him.

It appears that after complainant was examined in chief, the accused, who then was not represented, did not cross examine him; but the Magistrate took it upon himself to enter upon a lengthy examination of the witness, and recorded statements made by the witness affecting the character of accused which undoubtedly are likely to cause prejudice to accused.

I have no doubt that the Magistrate acted with the best of motives, and desired merely to test the witness, but the evidence which he recorded is evidence which was inadmissable under section 54 of the Evidence Act, and so far from recording it the Magistrate should not have permitted the witness to utter it.

I consider that this by itself is sufficient to warrant a transfer of the case to such other Magistrate as the District Magistrate may find convenient, and I make an order accordingly. For accused it is stated that he does not desire trial de novo, but he claims and is entitled that the Court examination of the complainant should be expunged from the record.

Application accepted.

Law Points in Certain Cases.

BEFORE MR. E. WESTON I.C.S.

**Nath mal* v. *Ram Sukh.*

Civil Revision No. 88 of 1935 decided on July 27, 1935, against the order passed by the Additional District Judge, Ajmer, on April 23, 1935, in Miscellaneous Civil Appeal No. 89 of 1934.

Criminal Procedure Code (1898)—S. 476—Motive of Prosecutor not material.

The motive of applicant in seeking prosecution is not material.

Criminal Proecdure Code (1898)—S. 476—Prosecution should not be ordered unless *reasonable* prospects of conviction—Prosecution not to be refused because conviction *not certain*.

While prosecution should not be ordered unless there are reasonable prospects of conviction, the courts should not decline to take action merely because a conviction is not certain.

Criminal Procedure Code (1898)—S. 476—Delay—Effect of:

Delay is a circumstance which should be taken into consideration; what is undue delay will depend upon the circumstances of the case.

Mr. Abdul Rashid—For Applicant.
Mr. Mohan Lal Capoor—For Opposite Party.

**Taher Hussain, Syed* v. *Bibban Devi, Shrimati.*

Small Cause Court Revision No. 97 of 1935, decided on August 17, 1935, against the order passed by the Judge, Small Cause Court, Ajmer, on June 21, 1935, in Suit No. 4453 of 1934.

Civil Procedure Code (1908)—O. 16, R. 14—Power to be exercised for substantial reason:

The courts have jurisdiction to call witness not offered by the parties. This power is to be used only for substantial reason.

Mr. Jawand Lal Datt Chowdhry—For Applicant.
Mr. Mohan Lal Capoor—For Opposite Party.

Amar Singh and others v. Partab Singh

Criminal Revision applications Nos 29 36 of 1935, decided on August 22, 1935, against the order passed by the Additional Sessions Judge, Ajmer, on June 8, 1935, in Criminal Revision No 33 of 1935

Criminal Proc dure Code—S 252 (2) and 540—Magistrate has no duty of conducting the prosecution—He has *discretion* to summon witnesses.

S 252 (2) places no duty upon a Magistrate to conduct the prosecu tion case and summoning such witnesses as he may find necessary to fill gaps in the prosecution, but a discretion exists to Criminal Courts under S 540 to summon witnesses not called by parties

Mr Akshai Singh Dangi—For Applicants.

Mr Bulbh Das Khanna—For Complainant

Khan Bahadur Abdul Wahid Khan—For Crown.

Kesar, Mst v *Dhool Chand.*

Miscellaneous Revision No 65 of 1935, decided on September 13, 1935, against the order passed by the Sub Judge, Beawar, on January 5, 1935, in Civil Suit No 21 of 1934

Civil Procedure Code (1908)—O 1, R 10—No addition of party where vague assertions of being interested in the property:

The applicant made vague assertions that she was in possession the property She gave no indication as to the amount of her interest, how it was derived or whether she was in possession, *Held*, the Court was not bound on such allegations to make her a party

Mr Shiam Swarup Mathur—For Applicant.

Mr Gopinath Nath Bhargava—For Opposite Party.

BEFORE MR. E. WESTON, I.C.S.

Bisheshwar Lal ....Appellant.

Versus.

Beni Gopal ....Respondent.

Miscellaneous Civil Second Appeal No. 84 of 1934, decided on August 26, 1935, against the judgment passed by the Additional District Judge, Ajmer, on October 25, 1934, in Miscellaneous Civil Appeal No. 40 of 1934.

Transfer of Property Act (IV of 1882) (as amended by Act XX of 1929)—S. 52—Injunction goes with the land :

The law after amendment of S. 52 by Act XX of 1929 is that the injunction will go with the land.

Transfer of Property Act (IV of 1882) (before amendment by Act XX of 1929) S. 52—Injunction suit—Plaintiff not to be excluded from benefit of lis pendens unless he had neglected to take action on breaches of the injunction—Doctrine independent of notice to third party:

The doctrine of lis pendens is independent of notice to the third party and the activity contemplated by Section 52, existed not for the purpose of giving notice to the third party but for the purpose of depriving a litigant of benefit who was guilty of laches in prosecuting whatever remedy was open to him. In an injunction suit, even under the old Section 52, the plaintiff should not be excluded from the benefit of lis pendens unless he had neglected to take action on breaches of the injunction.

Mr. Mohan Lal Capoor—for Appellant.

Mr. Swarup Narain Agarwal—for Respondent.

Judgment:—The facts giving rise to this appeal are as follows.

Respondent Beni Gopal as manager of the temple Sri Narsinghji Maharaj of Ajmer filed suit No. 28 of 1919 against four persons Bansilal, Govindlal, Bishenlal and Askaran for an injunction restraining them from interfering with plaintiff's

easements of light and air, and for a mandatory injunction for removal of certain constructions. He obtained the two injunctions in the trial Court. In appeal the perpetual injunction was sustained, but in place of the mandatory injunction cash compensation was awarded and was paid to plaintiff. This appeal it may be mentioned was filed by present appellant as mukhtar-am of the Official Receiver in charge of the property of Bansilal and Govindlal. It appears that Bishenlal was joined as defendant as the then mukhtar-am of the Official Receiver, and that appellant who succeeded him was also the son and legal representative of Bishenlal. The decree however was actually passed personally against Bishenlal.

In January 1930 the property of Bansilal and Govindlal constructions in which had given rise to the above suit was purchased by appellant, his son, and some other relatives. Constructions in violation of the injunction are then said to have been made by appellant. Respondent then applied to execute the decree against appellant and after finding that there had been disobedience of the injunction the Sub Judge passed an order under Order 21 Rule 32 that the property in question should be attached. The order has been confirmed in appeal by the Additional District Judge.

The contention of appellant was that he was not a party to the decree and was not bound by it. He also contended that he was not the sole purchaser and that it was not shown that he alone had made the constructions. This last contention has not been pressed before me.

Mr. Mohan Lal Capoor for appellant relies upon what he urges is an established principle that an injunction is personal and does not run with the land. In the doctrine of lis pendens is to be invoked. He claims that the law to be applied is section 52 of the Transfer of Property Act as it now stands, but as it stood before the amending Act

(Act XX of 1929) came into force on 1st April 1930 some months after appellant acquired the property. He claims that if the doctrine of lis pendens is held applicable to decree for injunction, then the amending act has made a substantial change in the law and cannot have retrospective effect. If it makes no change in the law then the law must be held to be as interpreted by the Bombay High Court.

It is true that the Bombay High Court has expressed in a number of decisions the view that an injunction being a personal remedy does not run with the land. The following cases are in point.

I. L. R. 26 Bombay page 140.
I. L. R. 32 Bombay page 181.
I. L. R. 42 Bombay page 504.
I. L. R. 55 Bombay page 709.

The Bombay High Court however has recognised departures from this principle. In I L. R. 20 Bombay page 283 it was held that an injunction (restraining interference with a right to light) against a defendant could be executed against his legal representative under section 50 of the Civil Procedure Code. In 51 Bombay page 37 a defendant died after a decree for injunction had been passed against him. Execution was sought against his widows. The widows transferred the property during the pendency of an execution application. It was held that the execution application against the legal representatives was valid under section 50 of the Civil Procedure Code, and as the transfer was made during the course of a "contentious proceeding" the transfer could not affect the rights of the decree holder under section 52 of the Transfer of Property Act. It appears that in this case execution was sought under clause (5) of order 21, Rule 32 The question whether the decree-holder could claim execution under clause (1) against a legal rep tative a transferee was not decided.

The decision that execution could proceed against a transferee pendente lite under clause (5) that is to say by removal of constructions from the property itself marks in my opinion a very substantial departure from the principle that an injunction does not subsist beyond the person against whom it was passed originally; and when a principle of English law by reason of Indian statutory provisions is held inapplicable to a considerable extent, it is open to argument whether it can be said to operate at all.

Under Section 52 of the Transfer of Property Act as it now stands pendency extends up to complete satisfaction of the decree. It cannot be said that respondent's decree for injunction has been completely satisfied. The suggestion that lis pendens cannot be applied to injunction suits is negatived by the decisions of the Bombay High Court upon which Mr. Mohan Lal Capoor relies. It seems to me clear that under section 52 the law now is that the injunction will go with the land.

The question then arises whether the amendment by Act XX of 1929 made a substantive change in the law, and if so whether the change can affect appellant who acquired the property before the amendment came into force.

Under section 52 as it stood before the amendment lis pendens came into play on transfer 'during the active prosecution ... of a contested suit or proceeding'. It is not easy to determine what can be said to have been the law on the interpretation of the words "active prosecution". In one Bombay case it was held that lis pendens ended with the decree. Other cases appear to have been decided on the standard of diligence on the part of a decree holder. In the words of Sir Dinshaw Mulla (Transfer of property Act, p. 107) the connotation of the words 'active prosecution' [illegible]

[illegible]

I have not been able to trace any reported case in which the application of the rule of lis pendens was considered in relation to a decree for injunction in which no execution was pending. The Bombay High Court held that lis pendens applied when an execution application was pending and what view they would have taken if no such application was actually pending is a matter for conjecture. I am not prepared to agree that the rule followed in 12 Bombay page 217 must be applied. A decree for injunction is peculiar. Generally speaking execution of it is not a matter over which the decree-holder has primary control. He can move only upon breach of the injunction by the opposite party. If the decree-holder is not shewn to have neglected any breach I do not see why he should be penalised as inactive because he has been unable to set the Court in motion. The doctrine of lis pendens is independent of notice to the third party and the activity contemplated by section 52 in my opinion existed not for the purpose of giving notice to the third party but for the purpose of depriving a litigant of benefit who was guilty of laches in prosecuting whatever remedy was open to him. In this view I see no great difficulty in holding that in an injunction suit even under the old section 52 the plaintiff would not be excluded from the benefit of lis pendens unless he had neglected to take action on breaches of the injunction. It is true that such a decision would be in conflict with the English principle adopted by the Bombay High Court, but I am not bound by those decisions, and there do not appear to be any decisions of this Court. As already stated the law as it now stands under section 52 is that the injunction will run with the land, and it is enough for me to find that I am not satisfied that the amending act of 1929 changed a law applicable to the facts of the present case as applied in this Province or generally accepted by the High Courts in India.

The question as to the retrospective effect of the amendment then need not be considered.

would remark that in the Nagpur case[1] which was a case of a decree for specific performance of an agreement of sale it was held that under the old section owing to the laches of the decree holder he would not be entitled to the benefit of lis pendens. So far as the facts of that case were concerned the amendment involved a substantive change in the law as applied in Nagpur, and although the amendment of section 52 was not included in section 63 of Act XX as an amendment which was not to have restrospective effect it was held that in view of the provision

> "and nothing in any other provision of this Act shall render invalid in any way anything done before the first day of April 1930 in any proceeding pending in the Court on that date"

the substantial change could not have retrospective effect.

On the other hand in a case reported in I.L.R. 10 Patna page 234 it was remarked that the explanation added to section 52 of the Transfer of Property Act by the Amending Act of 1929 does not alter the law. But here again the point at issue was not that arising in the present case.

Lastly it has been urged for respondent that in any case section 40 of the Transfer of Property Act applies. This section relates to right apart from easement usually known as restrictive convenants and I do not consider that it can have any application to the present case.

The decision of the Lower Courts that respondent can seek to enforce the injunction against appellant must be upheld. The question whether he can proceed under the first clause of Order 21, Rule 32 has not been raised before me and I do not propose to consider it. Appellant is not only a trustee but is also legal representative of a person against whom the decree was passed.

The appeal therefore is dismissed with costs.

1. 1931 C 733

Appeal dismissed.

BEFORE MR. E. WESTON, I. C. S.

Ale Rasul Ali Khan, Dewan Syed. Objector-Appellant.

Versus

Bal Kishen, Seth and *others.* Decree-holder-Respondents.

Miscellaneous Civil Appeal No. 72 of 1934, decided on July 23, 1935, against the order passed by the Additional District Judge, Ajmer, on July 26, 1934, in Miscellaneous Civil Appeal No. 51 of 1934.

Civil Procedure Code (1908)—S. 151 and O. 17 R. 3—Adjournment on condition that Costs be paid on next date—costs not paid—Court can dismiss for want of prosecution :

Adjournment was allowed on condition that costs of the other side were paid on the next date. The costs were not paid on the next date. The Court dismissed the appeal for want of prosecution. *Held*, as conditions of adjournment were not complied with, the adjournment must be taken not to have been given. The order dismissing the appeal for want of prosecution was an order which the court had power to pass and which was the proper order in the circumstances.

R. B. Mithan Lal Bhargava—for Appellant.

Mr. Ghisu Lal Dhanopia—for Respondent.

Judgment.—The facts giving rise to this appeal are briefly as follows.

Present appellant is judgment-debtor in suit no. 66 of 1913 and appealed from certain orders passed in execution. The appeal was fixed for hearing before the Additional District Judge on 28th June 1934. On that date the proceedings shew that at first neither of the two pleaders representing appellant was present. They then appeared in turn and each placed the responsibility for arguing the appeal on the other. The Additional District Judge while commenting adversely and with justfication upon this behaviour, allowed an adjournment on condition that the costs of the other side which he at Rs. 100 were paid on the next date.

On the next date 6th July 1934 the costs were not paid and the pleader for appellant declined to assume any personal responsibility for the amount. After waiting for some time the Additional District Judge passed an order dismissing the appeal for want of prosecution.

An application was made for restoration or for review of the order of 6th July 1931. This the Additional District Judge dismissed by order dated 26th July 1934.

The present application purports to be an appeal from the order of 26th July 1934 read with the earlier orders of 6th July 1931 and 28th June 1934.

The facts are not disputed. The Additional District Judge allowed an adjournment on certain conditions, and as those conditions were not complied with, the adjournment must be taken not to have been given. I do not consider it material whether the order of 28th June 1934 should be taken to have been passed under Order 17, Rule 3 or under Section 151 Civil Procedure Code. Probably the latter is more appropriate. There was flagrant neglect to comply with the condition upon which the adjournment was granted, and the order dismissing the appeal for want of prosecution was an order which the Court had power to pass, and which was the proper order in the circumstances.

While the learned Additional District Judge rejected the further application mainly because he considered that his order amounted to a decree, it is clear that he was not prepared to minimise its merits, and in fact the further application had no merits.

I can see no reason to consider interference with this application. If considered as an appeal or as [illegible] [illegible].

It is dismissed with costs.

Application dismissed.

BEFORE MR. E. WESTON, I. C. S.

Rama .... Appellant.

Versus

Bakhti, Mst. .... Respondent.

Civil Second appeal No. 66 of 1934, decided on July 10, 1935, against the judgment and decree passed by the Additional District Judge, Ajmer, on July 25, 1934, in Appeal No. 14 of 1933.

Civil Procedure Code (1908)--S. 100—Question of fact—Appreciation of Documentary Evidence is question of fact.

No question of law arises merely because some of the evidence considered was documentary. The construction of a document may be a question of law but appreciation of the evidentiary value of statements contained in documents which are not documents of title upon which the suit is based is no more a question of law than is appreciation of statements in the oral testimony of witnesses.

Mr. Chand Karan Sarda—for Appellant.
Mr. Jyoti Swarup Gupta—for Respondent.

Judgment.—This second appeal arises from a dispute concerning the ownership of certain lands which admittedly belonged to one Himta. Defendant Rama redeemed a mortgage on these lands and was in possession. Plaintiff claimed that she had the right to the lands, and she sued for possession on payment of the amount of redemption money. Plaintiff's case is that Himta had only one son Zora and that she is widow of this Zora. Defendant's case is that he is a second son of Himta and that plaintiff was never married to Zora although she lived with him for many years.

The trial Court found that plaintiff was married to Zora and that defendant was not the son of Himta but his step son. Plaintiff's suit therefore was decreed.

In appeal the findings of the trial Court we ied.

Now the question whether plaintiff was married to Zora and whether defendant was the son of Himta are questions of fact which cannot be taken up in second appeal. No question of law arises merely because some of the evidence considered was documentary. The construction of a document may be a question of law but appreciation of the evidentiary value of statements contained in documents which are not documents of title upon which the suit is based is no more a question of law than is appreciation of statements in the oral testimony of witnesses.

The document relied upon by appellant is exhibit D/21. This was a compromise in a suit filed by Jisraj, a mortgagee, against Zora and defendant. In this document following the heading of the suit defendant is described as son of Himta. It is not shown that Zora had any interest to serve that defendant was a proper party to the suit, and the document clearly is of little value as evidence of defendant's parentage.

The documents relied upon by plaintiff were entries in the revenue record of the name of Zora alone after the death of Himta and of her own name after the death of Zora. It is true that these entries do not determine the fact but the absence of any attempt by defendant to have his name entered is not without significance.

It is very possible that on the evidence I might have come to the same conclusion as the trial Court, but these have been findings of fact recorded and I am not able to interfere with these findings of fact in second appeal.

The appeal therefore must be dismissed with costs.

Appeal dismissed.

BEFORE MR. E. WESTON, I. C. S.

Abdul Latif, Seth .... Appellant.

Versus

Ahmad Husain, Seth and *others*. .... Respondents.

Miscellaneous Civil Appeal No. 93 of 1934, decided on September 5, 1935, against the judgment passed by the Additional District Judge, Ajmer, on September 27, 1934, in Miscellaneous Appeal No. 97 of 1933.

Provincial Insolvency Act (1920)—S. 4 (3)— Debtor's immovable property cannot be sold before adjudication.

Insolvency Judge has no jurisdiction to order sale of the debtor's immovable property before adjudication. The Section merely authorises the Insolvency Judge to decide objections and questions raised by third parties.

Provincial Insolvency Act (1920)—S. 4—Scope—Only debtor's saleable interest can be sold.

Section 4 is provided in order to give a finality to decisions of the Insolvency Court on questions of title. The third clause does not create any extraordinary power of sale, but permits sale of the saleable interest when the Court does not think it necessary or expedient to decide questions of title.

Practice—Immovable property subject to interim attachment—Court has no power to order sale under Civil Procedure Code.

Under the Civil Procedure Code a Court has no power to order sale of immovable property subject to interim attachment.

Mirza Abdul Qadir Beg—for Appellant.
R. B. Mithan Lal Bhargava—for Respondents.

Judgment.—The facts leading to the present appeal are as follows:—

Respondents 2 and 3 applied to be adjudicated insolvents, and an interim receiver of their property was appointed by the Insolvency Court. Respondent No. 1 is a mortgagee

with possession of certain immovable property of the debtors, while present appellant is a second mortgagee. The Receiver reported to the Court that he considerd that respondent No. 1 by reason of his possession was obtaining an unfair advantage over other creditors and recommended that the property should be sold. The Court ordered sale of three houses, and the large house was purchased in the auction by respondent No. 1 for Rs. 14,000. It appears that the two other houses are of little value. It is not very clear whether respondent's mortgage covers only the large house or also the two houses.

Respondent No. 1 then applied to set aside the sale on the ground that he had bid under the misapprehension that all three houses were being sold. The Judge accepted his contention, set aside the sale and ordered fresh sale to be held.

Present appellant then applied for review of this order. His application was accepted. The order setting aside the sale was cancelled and the original sale was upheld.

Respondent No. 1 then appealed to the District Court. The Additional District Judge held that the Insolvency Judge had no jurisdiction to order sale of the debtor's immovable property before adjudication, and that section 4 of the Provincial Insolvency Act which was relied on as giving jurisdiction merely authorises the Insolvency Judge to decide objections and questions raised by third parties. He also held that the sale had not been conducted with proper formalities.

He therefore cancelled the original sale as held without jurisdiction, and directed that the property should be regularly sold by the Receiver.

I understand that an order of adjudication has now been passed and that the Receiver is no longer an interim Receiver.

The object of the present appeal is to obtain an order upholding the original sale. It is urged for appellant that the Court had jurisdiction to sell under the powers conferred by section 4 of the Provincial Insolvency Act, and further that in such a sale it is not necessary to observe the formalities prescribed for the conduct of Court sales under the Civil Procedure Code.

R. B. Mithan Lal for respondent No. 1 has not chosen to base his case on the argument that section 4 does not give power to sell. He maintains that even if power exists under this section that power is limited to sale of the saleable interest of the debtor in the property. In the present case this saleable interest was only the right of redemption, and the Court therefore acted ultra vires in selling the property free of encumbrance.

I am inclined to agree with the view taken by the learned Additional District Judge as to the purpose and extent of section 4. Ordinarily property does not vest in an interim receiver, and there is in fact no suggestion that the receiver had any power to sell. Under the Civil Procedure Code a Court has no power to order sale of immoveable property subject to interim attachment. It seems to me that section 4 is provided in order to give a finality to decisions of the Insolvency Court on questions of title, and that the third clause does not create any extraordinary power of sale, but permits sale of the saleable interest when the Court does not think it necessary or expedient to decide questions of title.

Even if the Court had power to sell under this section, it could have power to sell only the saleable interest of the debtors, and as urged for respondent, this saleable interest

was the equity of redemption. Respondent No. 1 was a secured creditor, and there is no suggestion that he relinquished his security for the benefit of other creditors. His action in bidding was not acquiescence in the sale. The order of sale of the property without regard to respondent's mortgage therefore was ultra vires on that account.

It is not necessary to consider whether a Court selling property under section 4 should observe the formalities prescribed by the Civil Procedure Code.

The appeal must fail. It is dismissed with costs.

Appeal dismissed.

BEFORE MR. E. WESTON, I.C.S.

Crown .... Appellant.

Versus.

Abdul Shakoor .... Respondent.

Criminal Appeal No. 12 of 1935, decided on July 25, 1935, against the judgment passed by the Additional Sessions Judge, Ajmer, on April 5, 1935 in Criminal Appeal No. 7 of 1935.

Criminal Procedure Code (1898)—S. 196—Sanction—Requirements of Sanction must be proved—It must indicate acts and dates

It must be proved that the Local Government passed the order sanctioning prosecution. It must give an indication as to the acts alleged to have been committed and the dates when the offences are alleged to have been committed.

Criminal Procedure Code (1898)—S. 196—Sanction—Defect in—Cannot be cured by fresh order

The order sanctioning prosecution must precede the complaint. A defect in the order cannot be cured by a fresh order. It is not competent to a court to set aside the proceedings of the Magistrate and the whole case de novo and to leave the local Government to take such further action by order and fresh complaint as it may be advised to take.

M. B. Abdul Wahid Khan—for Appellant.

Mr. Jamnal Lal Bedi—Counsel—for Respondent.

Judgment.—The facts of this case are as follows.

Opponent Abdul Shakur was prosecuted for offences punishable under section 153-A and 505 I. P. C. in the Court of the City Magistrate, Ajmer and was sentenced to a fine of Rs. 50 on each charge.

In appeal the Additional Sessions Judge held that the sanction of the Local Government required under section 196 of the Code of Criminal Procedure was defective both in form and in substance, but while setting aside the conviction and sentences ordered a retrial upon the Magistrate receiving a copy of the order of sanction in due form and substance.

An appeal has now been preferred by the Public Prosecutor who urges that the sanction was not defective, and that the order of retrial after receiving sanction is illegal.

I must agree with the learned Additional Sessions Judge that the order relied upon as made by the Local Government is defective. In the first place there is no proof that the Local Government passed any such order. The document produced does not bear the signature of the Secretary, but of a Superintendent of the Commissioner's Office and it is not even a certified copy. Even if such an order was passed it gives no indication as to the acts alleged to have been committed by opponent for which a complaint was to be filed, nor the dates when any offences are said to have been committed. No attempt was made in the case to connect the order with the allegations in the complaint, and sections 153-A and 505 can cover a large variety of acts committed.

I must agree therefore that if the order was passed, it did not contain sufficient material to shew that it referred to the actual complaint made.

The learned Additional Sessions Judge seems to have thought that the defect would be cured by a fresh order

under section 196 Criminal Procedure Code, but the order should precede the complaint, and the most satisfactory course will be to set aside the proceedings of the Magistrate as held without jurisdiction, and to leave the Local Government to take such further action by order and fresh complaint as it may be advised to take. It is suggested before me for opponent that a fresh prosecution will not lie, but this is a question upon which I am not called upon at present to express an opinion.

I therefore order the proceedings of the Magistrate to be set aside as taken without jurisdiction. The fines if paid should be refunded.

Proceedings set aside.

BEFORE MR. E. WILSTON, I. C. S.

Abdul Rehman .... Defendant-Appellant.

Versus

Rasul Bux .... Plaintiff-Opposite party.

Miscellaneous Civil Appeal No. 69 of 1934, decided on July 10, 1935, against the order passed by the Additional District Judge, Ajmer, on July 23, 1934, in Civil appeal No. 15 of 1933.

Ajmer Regulation II of 1877—S 67—Plaintiff's remedy by execution proceedings and not suit when defendant in possession, Civil Procedure Code (1908) S. 47.

Plaintiff's remedy is under Section 47 of the Code of Civil Procedure and not by suit if defendant obtains actual possession, however wrongful, of the land in suit.

Mr. Jaswant Nandan Bhargava—for Appellant.
Mr. Anand Prasad Bhargava—for Opposite party.

Judgment.—The facts giving rise to this appeal are as follows. Respondent filed suit No. 12 of 1927 seeking a declaration that he is in possession of certain land and for

rectification of entries in the revenue records in favour of appellant relating to the suit land made by order of the Tahsildar, Ajmer, dated 18th January 1928.

Numerous contentions were raised by appellant-defendant but the trial Court dismissed the suit on a preliminary issue holding that it was barred by res judicata by reason of the judgment of the Chief Commissioner in Civil second appeal No. 17 of 1916.

In appeal the learned Additional District Judge has held that while the findings of the Chief Commissioner are binding upon present plaintiff, those findings do not bar the present suit by res judicata, that admittedly wrong entries have been made in the revenue records, that defendant by the judgment of the Chief Commissioner has only a limited interest in the land which was the subject of the previous litigation and that plaintiff is entitled to have the revenue records corrected under section 67 of Regulation II of 1877.

The case therefore was remanded for disposal on the remaining issue.

Defendant has filed the present appeal against the order of the Additional District Judge.

It is clear that the judgment of the Chief Commissioner referred to awarded a share of the land then in suit to present plaintiff, and the effect of this judgment is that plaintiff has certain rights not that he has no rights. The effect of the judgment will be to limit plaintiff to the rights awarded to him by it.

I am informed that no decree was drawn up following the Chief Commissioner's judgment but that the proceedings were sent to the Collector for execution. It is not clear whether this was done under section 54 or under section 68 Civil Procedure Code. In those proceedings symbolical possession is said to have been given to defendant not of the land to which he was held to be entitled but of all the land then in suit, and entries in the revenue records were made

in accordance with this action. Plaintiff's present case is that he is in possession of the share to which he is entitled under the judgment of the Chief Commissioner and that he has always been in possession.

It has been urged for appellant that plaintiff's remedy if any is under section 47 Civil Procedure Code and not by suit This objection would have force if appellant had obtained actual possession however wrongful of the land in suit. As already stated it is plaintiff's case that he never lost possession, and it has not been explained before me how this was a case where symbolical possession could have been given If plaintiff in fact is not in possession then he has no case. An issue as to possession is one of the issues still to be tried. If plaintiff is in possession and defendant never obtained possession then no question of section 47 can arise Mutation of names in revenue records may be a consequence of execution, but it has not been shewn that mutation of names made can be held to be have been part of the execution proceedings if in fact there were any execution proceedings.

In the circumstances the appeal is dismissed with costs.

Appeal dismissed.

BEFORE MR E. WESTON, I. C. S

Chhgan Mal .... Appellant.

Versus.

Panna Lal .. ... . Respondent.

Civil Appeal No 79 of 1934, decided on September 10, 1935, against the order passed by the Additional District Judge, Ajmer, on June 26, 1934, in Execution Case No. 7 of 1934.

Civil Procedure Code (1908)—O. 21, R. 2—Adjustment—Uncertified—Cannot be recognised

An uncertified adjustment cannot be recognised by the Executing Court.

Mr. Sohan Sunder Banerjee—for Appellant.

Mr. Sukhdeo Narain Agrawal for Respondent.

Judgment.—The facts leading to this appeal are briefly as follows. Present applicant obtained a decree against

respondent on 18th August 1930 for an amount of Rs. 400 odd, and applied in execution on 4th November 1933 to recover the balance of Rs. 280. Respondent pleaded an adjustment in that he had asked R. B. Nandmal, said to be brother of appellant, to credit the amount to appellant. The date of the alleged adjustment was not given but from the evidence of R. B. Nandmal it appears to have been made in January 1933.

R. B. Nandmal stated that the decree-holder had authorised him to adjust matters, but from his cross-examination it appears that he inferred the authorisation from an account sent by the decree-holder. He also states that he received intimation from the decree-holder not to deal with the account of the judgment-debtor, but he ignored it as he had already made the adjustment.

The learned Additional District Judge accepted that adjustment had been made and dismissed the execution application.

Before me objection has been taken for appellant that the adjustment was uncertified. This is not disputed. The objection was not taken before the executing Court nor was it mentioned in the memorandum of appeal It is clear however that the execution application was filed more than ninety days after the alleged adjustment and there is no question of the judgment-debtor by omission of the plea before the executing Court being deprived of an opportunity of having the adjustment certified. The question is purely one of law and I cannot refuse to consider it.

Under order 21, Rule 2 the adjustment cannot be recognised by the executing Court. I must allow the appeal and set aside dismissing the order the execution application. Execution should proceed.

As the objection was not raised in the memorandum of appeal I consider that appellant should bear the cost of respondent in this Court in addition to his own.

Appeal allowed.

BEFORE MR. E. WESTON, I. C. S.

Rashid Ahmad Khan .... Insolvent-Applicant.

Versus.

Sheo Dayal and *others* .... Opposite-Party.

Miscellaneous Civil Revision Application No. 103 of 1935, decided on September 5, 1935, against the order passed by the Additional District Judge, Ajmer, on April 26, 1935, in Insolvency Appeal No. 94 of 1934.

Provincial Insolvency Act (1920)—S. 42 (a)—Discharge—Grant of—On payment of eight annas in the rupee.

Ordinarily an insolvent should be granted his discharge on payment of eight annas in the rupee.

Provincial Insolvency Act (1920)—S. 42 (f)—Speculations—must be rash and hazardous:—

The dealings may not have turned out well, but for the purposes of S. 42 (f) the speculations must be rash and hazardous.

Mr. Debi Narain Simlot.—for Applicant.
Messrs. Debi Dayal Bhargava and *Sri Lal Agarwala.*—for Opposite-Party.

Judgment.—Applicant Rashid Khan was adjudicated insolvent. His debts according to the schedule totalled Rs 13,400 odd. They consisted partly of personal debts and partly of debts for which Rashid Khan had a joint liability with other persons.

Certain payments were made and amounts were recovered by an attachment order of the Insolvency Court on his pay.

He applied for his discharge, and the Insolvency Judge by order of 1st October 1931 allowed discharge but directed that discharge should take effect on the insolvent paying

eight annas in the rupee on his "unsecured" liabilities, and hat an attachment order for an amount of Rs 60 monthly rom his pay should continue until eight annas in the rupee were paid. He also ordered that the insolvent should be personally liable to pay eight annas in the rupee on his unsecured liabilities but if the creditors receive more than eight annas from any of the co-debtors, corresponding diminution should be made in the liability of the insolvent, as, for example, if the creditor receives nine annas from the co-debtors the insolvent will be liable to pay that creditor only seven annas.

In appeal the learned Additional District Judge considered that the surety debts were not entitled to preferential treatment. He also held that the insolvent had not kept proper books of account to explain the manner in which the loans contracted as surety were utilised, that these loans were rash and speculative, and that the insolvent had failed to shew what happened to the proceeds of certain shares worth Rs. 40 disposed of by him after adjudication. He considered therefore that the insolvent should not be given a discharge until he paid twelve annas in the rupee. As the insolvents pay was held to exceed Rs. 160 a month the order for attachment of Rs. 60 only was modified into an order for attachment of Rs. 75 monthly.

The insolvent has now come in revision.

Now ordinarily an insolvent should be granted his discharge on payment of eight annas in the rupee. I have not been able to ascertain what has been paid. I cannot see how the insolvent can be expected to have kept accounts of the application of loans to others for which he stood surety. He is not proved to have taken an active part in the dealings of those persons. The dealings may not have turned out well, but for the purpose of section 42 (f) the speculations must be rash and hazardous. I have not been able to find material

on the record to shew that the ventures were rash and hazardous The disposal of Rs 40 worth of shares is admitted but it is claimed that it was done in ignorance It is not a large matter and I do not think it is sufficient ground for refusal of discharge The learned Additional District Judge has allowed conditional discharge I think in fixing the payment to twelve annas in the rupee he has been influenced by the necessity of protecting the creditors to whom the insolvent alone is liable I gather that that the insolvent argues that any payments made by his co debtors are payments in his insolvency, with the result that if they pay an amount equal to half of respondent's total debt respondent has no liability whatever and his personal creditors will get nothing This interpretation cannot be allowed.

I consider that insolvent should be allowed discharge when the following conditions are fulfilled His personal creditors must receive eight annas in the rupee of their individual amounts The insolvent must also pay eight annas in the rupee of the debts in which he had a joint liability His liability extends to eight annas in the rupee on such debts as they stood on the date of his adjudication If however any creditor has received more than eight annas from other co debtors, the liability of insolvent will extend only up to the balance due I do not accept the view that these creditors must not be allowed to recover more than eight annas in the rupee from all their debtors The insolvent admittedly was liable for the whole and he must pay eight annas on that liability provided it is not otherwise discharged

I see no reason to modify the order that the attachment order should be for an amount of Rs 75 a month It is not denied that this is less than half his pay

There will be an order accordingly. I make no order as to costs.

Order Modified.

NOTIFICATIONS.

1 Process Fee.

Rules regarding Process fee and Process serving Establishment issued by the Judicial Commissioner, Ajmer-Merwara, on the 12th October 1928: Notification No. 1020.

The following rules made by the Judicial Commissioner, under section 20 of the Court Fees Act (VII of 1870), having been confirmed by the Hon'ble the Chief Commissioner, are published for general information in supersession of all previous orders on the subject.

The rules shall come into force from 1st. November 1928.

PART I

Rules applicable to Civil Courts.

1. The fees chargeable by all Civil Court in Ajmer-Merwar, including the Court of the Judicial Commissioner, shall be those shown in the appended table.

2. The amount or value of the subject matter of a suit or appeal as determined in sections 7 and 8 of the Court Fees Act, 1870, or under the rules made under the Suits' Valuation Act, 1887, whichever is higher, shall regulate the fees payable according to the appended table, and, where the subject-matter is not capable of valuation, the fees are to be levied according to column 9.

3. For processes applied for and ordered to be executed as emergent, the fee will be the ordinary fee and half as much again.

4. Where one individual is to be served in more than one capacity, e.g, personally and also as guardian of a minor or minors, only one fee is to be charged.

5. When a process issued by a Civil Court is returned unserved and has to be re-issued for service, a half fee only shall be charged on the occasion of each re-issue.

Provided that if the failure to effect service is due to the fault of the party the full fee may be levied.

6. (a) When the services of one or more bailiffs or peons are required for a longer period than three days, the party on whose application the process was issued shall, in addition to the fee leviable under the above rules, be required to pay the whole salary of such bailiffs or peons for the whole period in excess of three days.

(b) The time occupied in going to and returning from the place at which service of process is to be made shall not be reckoned as a portion of the above period.

(c) If the amount payable on account of salary under the above rule shall involve a fractional part of an anna such part shall be remitted.

7. In civil cases against a coparcenary body for land, and also in cases against several defendants for the levy of customary village dues recorded at settlement, other than cesses assessed by Government, only one fee shall be levied for the service of process on defendants or respondents who may reside in the same village, if they are not more than four in number, but if they are more than four in number then one-sixth of the ordinary fee leviable shall be charged for every such person in excess of four, provided that the aggregate fee payable shall in no case exceed Rs. 5

8. When the service is set aside in an enquiry under Order V, Rule 19, Civil Procedure Code, or when witnesses, etc., have to be summoned a second time in consequence of the Court not sitting or not taking up or not completing the hearing of the case on the day on which they were first summoned, no further fees is to be levied upon re-issue.

PART II

Rules applicable to Criminal Courts.

9. No fee shall be levied on any process issued by a Criminal Court in cognizable cases, that is, cases in which the police may arrest without warrant, according to the second schedule of the Code of Criminal Procedure (Act V of 1898) or any other law in force for the time being.

10. In non-cognizable cases, that is, cases in which the police have no power to arrest without warrant, process fees shall be levied as follows:—

	Rs.	A.	P.
(*i*) For every summons or notice	0	6	0
(*ii*) For every warrant of arrest	0	9	0
(*iii*) For every proclamation for absconding party or witness under Code of Criminal Procedure 1898.	1	8	0
(*iv*) For every warrant of attachment	0	12	0

Provided that no fee shall be levied on any process issued on the complaint of any public officer acting as such public officer.

Provided, also, that the Court may in its discretion, for reasons to be recorded in writing, remit the whole or any portion of the amount of the process-fee leviable under this rule.

PART III

11. Subject to the provisions of these rules, no fees shall be levied for any process which any Court may issue of its own motion, or by order of a superior Court in any suit or proceeding and not at the instance of any party to the suit.

12. A process issued by any British Court, whether of Civil, Revenue, or Criminal Jurisdiction, shall be served free of charge by any court in Ajmer-Merwara if it be certified on the process that the proper fee has been levied under the rules in force in the court issuing it. When any Civil, Revenue, or Criminal Court in Ajmer-Merwara sends a process for service or execution beyond the local limits of its ordinary jurisdiction, such Court shall endorse on the process a certificate that the fee chargeable under these rules has been levied.

13. Process servers shall ordinarily travel on foot, when proceeding to serve or execute processes, but in special cases, under the permission in writing of the court issuing the process, the journey may be made by railway or other conveyance. In all such cases the bona fide travelling expenses of the process server shall, as the court may in each case decide, either be charged to judicial contingencies, or be paid by the party at whose instance the process was issued.

PART IV

Rules Relating to Process serving Establishment.

14. The strength and service of process serving establishment shall be as prescribed from time to time by the Chief Commissioner.

15. On special occasions, should it be necessary in order to save delay, any Civil Court may employ an additional peon for the service and execution of any particular process. But the employment of such additional peon must be reported to the Court to which such Court is subordinate, with an explanation of the reasons therefore.

16. The distribution of process servers shall be made by the District Judge, according to the needs of the several Courts.

17. The Nazir of the District shall be deemed to be the Nazir of all the Courts at Ajmer, except the Court of Small Causes, and shall work under the general supervision of the District Judge or of such other officer as he may appoint. The English Bailiff shall be at the service of all the Courts at Ajmer.

18. The Nazir or any other officer of the Court conducting the sale of property in execution of a decree shall, under the orders of the Court ordering the sale of such property, be entitled to receive a commission at a rate not exceeding rupees five per centum on the proceeds of the sale when such proceeds do not exceed five hundred and at the rate of rupee one per centum on the proceeds exceeding five hundred. This commission is payable only on the proceeds actually received at the sale which is not subsequently set aside by the Court on an application under Order 21, Rule 90 or 91, and once only in respect to the sale property.

19. A register of process servers shall be maintained in the office of the District Judge.

20. Ordinarily Civil Processes shall only be served through the registered peons. When resort to others is necessary, the special sanction of the Court shall be obtained.

21. Every registered process server shall be supplied with a belt and badge, showing in English and Vernacular the Court to which he is attached.

22. In the selection of the process servers preference shall be given to those who can read and write.

23. On every process issued from any Court, there shall be recorded the name of the process server deputed to serve or execute the same, the period in which he is required to certify service or execution, the amount of fee paid and the date of payment. The date of return after service or execution, shall be subsequently endorsed. Such endorsement shall be signed by the Nazir or Naib Nazir and Bailiff.

24. The process registers shall be maintained by the Nazir and the clerks of the several Courts.

TABLE.

Fees chargeable in Civil Courts in respect of processes, proclamation and sales.

Name of process, etc.	Where the subject matter in dispute in all suits, appeal or proceedings.							In suits appeals or proceedings not otherwise provided for.
	Does not exceed Rs. 25.	Exceeds Rs. 25 but does not exceed Rs. 50	Exceeds Rs. 50 but does not exceed Rs. 250	Exceeds Rs. 250 but does not exceed Rs. 500	Exceeds Rs. 500 but does not exceed Rs. 1,000	Exceeds Rs. 1,000 but does not exceed Rs. 5,000	Exceeds Rs. 5,000	
1	2	3	4	5	6	7	8	9
	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.		Rs. a. p.	Rs. a. p.
I. For each summons or notice ...								
(a) To a single defendant, respondent or witness	0 4 0	0 6 0	0 12 0	1 0 0	1 8 0	Rs. 1-8-0 for the first Rs. 1,000 and As. 8 for every Rs. 1,000 or part thereof in excess.	5 0 0	1 0 0
(b) To every additional defendant, respondent or witness residing in the same village if the process be applied for at the same time.	0 2 0	0 3 0	0 6 0	1 8 0	0 12 0	As. 12 for the first Rs. 1,000 and As. 4 for every Rs. 1,000 or part thereof in excess of Rs. 1,000.	2 8 0	0 8 0
II. For every warrant— (a) of arrest in respect of every person to be arrested; (b) of attachment, in respect of every warrant (c) of sale, in respect of every such warrant.	0 8 0	0 12 0	1 8 0	2 0 0	3 0 0	Rs. 3 for the first Rs. 1,000 and Re. 1 for every Rs. 1,000 or part thereof in excess of Rs. 1,000.	10 0 0	4 0 0
III. For every proclamation other than a proclamation of sale under Order XXI, Rule 66, Civil Procedure Code, for every injunction or order and every process otherwise provided for.	0 8 0	0 12 0	1 8 0	2 0 0	3 0 0	Rs. 3 for the first Rs. 1,000 and Re. 1, for every Rs. 1,000 or part thereof in excess of Rs. 1,000	10 0 0	2 0 0

Name of process, etc.	In all suits, appeals or proceedings
	Rs. a. p.
IV. For every proclamation of sale under Order XXI, Rule 86, Civil Procedure Code	2 0 0
V. For every sale of moveable or immoveable property	The commission payable to the Nazir under Rule 18, Provided that, when a sale is set aside under Order XXI, Rule 90 or 91, Civil Procedure Code the commission shall, on application, be refunded.

2. Service of Notices etc.

Notification, dated 18th July 1930, of the Judicial Commissioner, Ajmer-Merwara.

It has come to the notice of the Judicial Commissioner that parties to Civil Suits and applications apparently request bailiffs and process servers to take notices addressed to them to their Pleaders and Vakils. *This practice should be stopped at once,* and on any future occasion that a party makes a request of this nature, the process server should forthwith attach one copy of the process to the door of the party's house and make an appropriate report to the Nazir (O. 5. R. 17. C.P.C.). The process servers of the Court are not to be treated as private messenger by the parties, and the Judicial Commissioner hopes that all Judges of all courts in Ajmer-Merwara will enforce this rule strictly. Where a notice is tendered to a party and he has requested the process server to take it to his pleader, that in a genuine case should be regarded as adequate service, for after all the process server is only conferring the kindness on the party. But as has been stated above the practice is to be stopped.

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CONTAINING

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SUBJECT INDEX.

BEFORE MR. E. WESTON.

Deo Karan .... Defendant-Appellant.

Versus.

1. *Sugan Chand* .... Plaintiff-Appellant.

2. *Jai Kishan* .... Defendant-Respondent.

Civil Second Appeal No. 81 of 1934, decided on August 26, 1935, against the judgment and decree passed by the Special Additional District Judge, Ajmer, on September 1934, in Civil Appeal No. 225 of 1933.

Civil Procedure Code (1908)—Schedule II, Para 1—Party interested—Reference without consent of a party against whom ex-parte order was passed is illegal—Award and decree on such reference are absolutely void, Arbitration.

A party, although an ex parte order had been passed against him, was a party 'interested' within the meaning of Sch II, Para 1, *52 C. 85, 26 M. 47 and 47 C. 555*, **Referred.**

Civil Procedure Code (1908) Sch. II, Para 10—Award based on illegal reference is void, Award.

Award made on an illegal reference is absolutely void and does not require to be set aside. *47 Cal. 567 and 48 M. L. J. 142.* **Foll.** *2 P. 335* **Ref.**

Civil Procedure Code (1908)—Sch. II, Para 16—Decree passed on invalid reference is anullity, Decree.

A decree passed upon an award, when there was no valid reference, is a nullity.

Civil Procedure Code (1908)—Sch. II, Para 15—Validity of an award can be challenged when validity of reference is concerned.

Validity of an award can be challenged when the invalidity of the reference is in question, *48 A. 234,* **Foll.**

A mortgagee in possession can bring a suit for declaration that decree is not binding on him.

Transfer of Property Act—Section 52—Decree a nullity—Doctrine of Lis Pendens has no application.

Doctrine of Lis Pendens has no application when decree is a nullity.

Mr. Daya Shankar Bhargava—for Appellant.

R. B. Mithanlal Bhargava—for Respondent No. 1.

Jugdment.—The facts leading to this second appeal are as follows. Deo Karan, present appellant, filed a suit (no. 304 of 1927) for partition of certain ancestral property and possession of one quarter share in it. The suit was against present respondent Jai Kishan and two others Ambalal and Kalyan Singh. From the pedigree given in the plaint of that suit it appears that these four persons are the surviving members of the family of one Nand Ram. Jai Kishan and Kalyan Singh are descended from Mam Ram one son of Nand Ram while Ambalal and Deo Karan are descended from a second son of Nand Ram.

In this suit Jai Kishan filed a written statement admitting the pedigree but claiming that the suit property was the exclusive property of Mani Ram and that the suit should be dismissed. After filing the written statement Jai Kishan did not appear and an ex-parte order was passed against him. Subsequently the three remaining parties signed a deed of reference to an arbitrator which was presented in Court and an order of reference was made. The arbitrator made an award and a decree was passed in terms of the award on 10th March 1930.

During the pendency of the suit Deo Karan had made an application to the Court stating that Jai Kishan had sold certain of the suit property and was about to alienate other property and seeking an injunction restraining him from doing so. In accordance of the Court dated 11th December 1929 it is stated that defendant Jai Kishan was present and he undertook not to make any alienation of the property pending

disposal of the suit. The rule restraining him from alienating any of the property was made absolute accordingly.

On 24th October 1929 however Jai Kishan mortgaged with possession to one Sugan Chand plaintiff in the present suit part of the property for a sum of Rs. 500. Although Jai Kishan was not party to the reference he received notice from the arbitrator on 23rd October 1929 the day before he effected the mortgage. On 18th March 1930 Jai Kishan put in an application objecting to the award on the ground that he had no knowledge of the appointment of arbitrators and praying that the suit should be heard on its merits. On 22nd July 1930 his pleader appeared and stated that he did not wish to proceed with his objection. It was ordered to be filed.

By the award the property mortgaged to Sugan Chand fell to the share of Deo Karan and in execution he sought possession. Sugan Chand resisted possession being taken and on his applications to the executing Court failing he has filed the present suit. He claims that so far as Jai Kishan and he are concerned the award and decree in suit no. 304 of 1927 are absolute nullities. He gives a list of frauds said to have been practised upon Jai Kishan. He seeks that the decree in suit 304 should be declared illegal, void, without jurisdiction, fraudulent and inoperative against him. To this suit Deo Karan and Jai Kishan only were joined as defendants, but objection on the ground of non joinder of other parties to the original decree has not been taken before me.

Deo Karan by his written statement denied that the decree was inoperative and claimed that as the mortgage to Sugan Chand was made pendente lite while an injunction was in force against Jai Kishan not to alienate the suit property it was illegal. He also pleaded that Sugan Chand had no right to sue.

Jai Kishan it is said first put in a written statement favouring Deo Karan but subsequently sought to amend it to favour Sugan Chand. I have not been able to trace the original written statement of Jai Kishan, but whatever view be taken of his conduct he clearly has acted dishonestly and neither his pleadings nor his evidence would deserve the slightest weight.

The trial Court held that Jai Kishan was not a party to the agreement to refer to arbitration in suit no. 304 but that the decree based on the award was valid, legal and binding on Jai Kishan and therefore on Sugan Chand, that the decree had not been obtained by fraud, that the mortgage to Sugan Chand was illegal as it was passed after injunction had been issued and Jai Kishan had undertaken not to transfer property in suit during the pendency of the suit, and that Sugan Chand had no right to sue.

In appeal the learned Additional District Judge reversed the decision of the trial Court holding that as Jai Kishan did not sign the reference, the award and the decree passed on it are invalid, that the proceedings in the partition suit were of a collusive and fraudulent nature, that the doctrine of lis pendens has no application to suits of a collusive and fraudulent nature, and that Sugan Chand as a transferee for consideration was entitled to sue to set aside the decree. The appeal therefore was accepted and Sugan Chand's suit was decreed.

Deo Karan has now come in second appeal.

In his finding that there was collusion between Jai Kishan and other parties to suit no. 301 of 1927, the learned Additional District Judge, with [illegible] went outside the pleadings. No suggestion of collusion appears in the plaint of Sugan Chand. Fraud is alleged in that the reference was alleged to have been obtained in the absence of Jai Kishan

and fraud is alleged to have been practised on the Court by representing that all parties were making the application for reference, but these allegations are not allegations of collusion but on the contrary of fraud practised against Jai Kishan.

The suit was filed in the year 1927 while the transfer to Sugan Chand was made on 24th October 1929 the day after Jai Kishan received a notice from the arbitrators. I am prepared to accept that Jai Kishan acted dishonestly, but this does not mean that Deo Karan joined with him to defraud Sugan Chand. It is difficult to believe that a suit was filed two years earlier with the object of defrauding Sugan Chand or some other possible mortgagee. It is not out of place to notice that the mortgage to Sugan Chand was for Rs. 500 only and he appears to have been in possession of the house since his mortgage.

Jai Kishan's conduct in the partition suit when after filing an indefinite written statement he remained absent leads to no inference of collusion. The application by Deo Karan for injunction to restrain Jai Kishan from alienating property does not suggest that Deo Karan and Jai Kishan were in league to effect alienation. I can see no justification for an inference of fraud on the Court from the fact that after *ex parte* order was passed against Jai Kishan the parties applied for reference to arbitration. Their application to the effect that the parties desired reference may not be correct in law, but use of the word "parties" in the sense of the parties then before the Court is not prima facie fraudulent. The fact that the application was received by the Court reader who wrote the order upon it is only an example of the practice in this District of Judges delegating judicial duties to clerks who have no authority to perform them. The parties cannot be held responsible for the system.

After the award Jai Kishan appeared and raised objections to it. Notices were sent to Deo Karan and other parti

It is said that they refused to receive them. Even if they did as the objections appear to have been made after the decree, their conduct in relying on the decree obtained and avoiding proceedings in which it might be disturbed is not necessarily dishonest. They did not seek prosecution of Jai Kishan for breach of the injunction, but the inference of collusion seems to me very far from being conclusive. No doubt Jai Kishan has acted in a dishonest manner, but his dishonesty does not mean that the other parties to the suit were equally dishonest or in fact dishonest at all. My conclusion would be that there are not circumstances appearing from the record sufficient to justify the conclusion that the decree in suit no. 304 of 1927 was obtained by collusion between the parties or by fraud either upon Jai Kishan or upon the Court.

It is necessary therefore to consider apart from any questions of fraud or collusion the legal effect of the decree passed upon the award.

Mr. Daya Shanker for appellant does not dispute seriously that Jai Kishan, although an ex parte order had been passed against him, was a party interested within the meaning of Para 1 of Schedule 2 of the Civil Procedure Code. He was in possession of part of the suit property and his interest is manifest. I may however mention the following cases on the point: I. L. R. 52 Calcutta 85, I. L. R. 26 Madras 47 and I. L. R. 17 Calcutta 555.

Mr. Daya Shanker argues strenuously that although the reference to arbitration without the consent of Jai Kishan were wrong, yet it was not more than an irregular exercise of jurisdiction and the decree passed on the award although voidable is not absolutely void. His argument is that if the decree was only a voidable decree, it could be set aside by proper proceedings in the suit taken by a party, but that it cannot be challenged in other proceedings by a stranger, be a third party, and further that the third party Sewan Chand is out of Court by reason of the doctrine of his pleadings.

It is true that the reported cases on the validity of awards and decrees when all interested parties have not joined in the reference are cases which were decided on applications made directly from the decrees or awards in the suits concerned by parties to the suit, but this does not mean that by those rulings a decree on such an award was held to be voidable only. In fact the language used generally supports the view that such a decree must be void. For example in *Ladhuram* v. *Nandlal*[1] it is remarked :

> "If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded on a reference made without jurisdiction."

The strongest case on the question is one reported in 48 Madras Law Journal at page 142. It was held that a reference to arbitration made in a pending suit without the consent of all the parties interested in the litigation is not a mere irregularity but it takes away altogether the foundation of the Court's jurisdiction. The award made on such a reference is absolutely void and does not require to be set aside.

If the award is absolutely void then the decree made upon the award must be equally void.

R. B. Mithanlal has referred to the case *Pande Satdeo* v. *Ramayan Tewari*[2]... In this case it was held that where a minor is properly a party to a suit, that is to say, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. The report contains a lengthy discussion of the distinction

(1) I. L. R. 47 Calcutta at page 567. (2) I. L. R. 2 Patna 335.

between absence of jurisdiction and irregular exercise of jurisdiction which it is not necessary to repeat.

It seems to me impossible to hold that a reference to arbitration made under circumstances when a reference to arbitration is not allowed by the Civil Procedure Code is only an error of procedure. By making a reference the Court to a very large extent divests itself of its jurisdiction to try the suit. It is much more than an error of procedure for a Court to assume a jurisdiction which it does not possess, and I think it equally is more than an error of procedure for a Court, which has assumed jurisdiction, wrongfully to divest itself of that jurisdiction, or to put it another way to confer a wrongful jurisdiction upon an arbitrator.

A decree passed without jurisdiction is a nullity, subject to the exception relating to territorial jurisdiction given in section 21 of the Civil Procedure Code. In my view a decree passed upon an award when there was no valid reference equally must be anullity.

Lastly I have to remark that an objection that the validity of an award can be challenged only under Para 15 of Schedule 2 has no force. In the present case we are concerned with validity of the reference (see *Gopal Das* v. *Brij Nath*[1]).

On the above finding that the decree is a nullity, the doctrine of lis pendens can have no application. The parties to suit No 331 of 19 have no rights under the decree, that is to say, there are no rights under such decree for the transferee of Sagir Chand to effect. Sagir Chand is a transferee with possession, and he has a right to keep the possession. For the reasons given above I must hold that he is entitled to a declaration that the decree is not binding upon him.

For these reasons the appeal fails. It is dismissed with costs.

* * * * * * * * * * * *

Appeal dismissed.

BEFORE MR. E. WESTON, I. C. S.

Mala ... ... Applicant.

Versus.

Jawana .... Opposite party.

Small Cause Court Revision No. 3 of 1935, decided on July 28, 1935, against the order passed by the Judge, Small Cause Court, Beawar, on October 6, 1934, in Small Cause Court Execution Case No, 349 of 1932.

Civil Procedure Code (1908)—O. 21. R. 2—Parties can substitute fresh contract for decree—It will amount to adjustment.

It is open to parties to a decree to substitute a fresh contract for a decree, and for the judgment debtor on such fresh contract having come into existence to apply for the adjustment to be recorded. An agreement that at some future time on delivery of property the decree would be considered satisfied would be no adjustment.

Evidence Act—S. 101—Heavy burden to prove adjustment of decree by executory contract, Burden of proof.

When a judgment-debtor asks a court in the face of a denial by the decree holder to hold that the latter has agreed to substitute for his decree an oral agreement to deliver some property when admittedly no property has as yet been delivered, the burden of proof is heavily upon him to prove the agreement and that the decree has in fact been adjusted. The burden of proof upon the judgment-debtor would not be discharged by evidence of talk of compromise or by proof of the terms which the judgment debtor was putting forward to secure such a compromise.

Mr. Raj Narain Mathur—for Applicant

Mr. Govind Prasad Mathur—for Opposite party.

Judgment.—The facts of this case are briefly as follows :

Applicant Mala obtained a decree against Opponent Jawana in Small Cause Suit No. 474 of 1929 for an amount of Rs. 85-15-9. In the year 1932 he filed an execution applica-

tion for arrest, whereupon the judgment debtor filed an application under Order 21, Rule 2 claiming that the decree had been adjusted by an under-taking by him to give to the decree holder a stock of fodder and a stock of manure. The decree holder denied that any such adjusment had been made, and on 13th July 1932 the Court passed an order in the proceedings which reads as follows:

> "Parties present. They have compromised amicably, but the decree holder wants money and not the property. Execution application be put up on 12th September 1932, and by that time the parties may arrive at some settlement. If the parties do not agree to any compromise, they may appear on the date fixed when evidence will be recorded as to whether there has been any compromise or not".

On the application under Order 21 on the same day an order was passed.

> "Parties present. They are given two months time, therefore no action can be taken on this application. It is therefore ordered that the judgment debtor's petition be filed".

On 12th September the decree holder did not appear and the execution application was dismissed for default. No order was passed on the application under Order 21, Rule 2. The decree holder however within a month filed a fresh execution application, and the judgment debtor renewed his application under Order 21, Rule 2. The adjustment again was denied by the decree holder but the Court after recording evidence allowed the application and has recorded complete adjustment of the decree.

The decree holder now comes in revision.

I am not in agreement with the view that it is not open to the parties to a decree to substitute a fresh contract for the decree, and for the purpose of determining whether a contract having come into existence to apply under Order 21, Rule 2

"for the adjustment to be recorded."[1] But clearly, when a judgment debtor asks a Court in the face of a denial by the decree holder to hold that the latter has agreed to substitute for his decree an oral agreement to deliver some property when admittedly no property has as yet been delivered, the burden of proof is heavily upon him to prove the agreement and that the decree has in fact been adjusted. An agreement that at some future time on delivery of property the decree would be considered satisfied would be no adjustment, nor would the burden of proof upon the judgment debtor be discharged by evidence of talk of compromise or by proof of the terms which the judgment debtor was putting forward to secure such a compromise.

In the present case the oral evidence of the two witnesses for the judgment debtor clearly is of little value. The trial Court has based its acceptance of the judgment debtor's case upon an interpretation of the proceedings of July 13th 1932 which, it considers, shew that a compromise had taken place.

Those proceedings on the contrary shew very clearly that while there was talk of compromise, no compromise has taken place, and the learned Judge has misdirected himself on this part of the evidence. There is no other evidence worth consideration, and the probabilities are all against the decree holder giving up his decree for a mere verbal undertaking.

I must allow the application and set aside the order of the trial Court. The application under Order 21, Rule 2 is dismissed, and execution application should be restored to file and disposed of on its merits. Applicant decree holder must have his costs from opponent in this Court. Costs in the trial Court will be costs in the execution application.

1. See I L R 51 Madras 198.

BEFORE MR. E. WESTON, I. C. S.

Chand Mal and *another* .... Applicant.

Versus.

Mohommad Hussain and *other* .... Opposite party.

Civil Revision Petition No. 107 of 1935, decided on September 12, 1935, against the order passed by the Sub Judge, First Class, Ajmer, on July 10, 1935, in suit No. 68 of 1933.

Civil Procedure Code (1908)—S. 115 and O. 6, R. 17—An order refusing amendment is a "case decided".

A refusal to allow an amendment is a case decided within the meaning of S. 115. *A. I. R. 1935 Allahabad 353* Foll.

Civil Procedure Code (1908)—O. 6, R. 17—Different cause of action—Suit for ejectment—Amendment cannot be allowed to convert it into suit for possession.

Suit for ejectment. Defendant claimed that he was owner. Defendant died. His legal representatives claimed that they were in possession in their own right. Plaintiff then applied to amend the plaint to sue in the alternative for possession on the basis of title.

Held, the proposed amendment will introduce a different cause of action. The refusal to amend will not deprive the plaintiff of any right.

Mr. Mohan Lal Capoor—For Applicant.
Mr. Swarup Narain Agarwal—For Opposite Party.

Judgment.—This is a revision application from an order of the Sub Judge, First Class, Ajmer, refusing an application by a plaintiff to amend the plaint.

A preliminary objection has been taken that the order is interlocutory and that no revision lies. It was held in a recent case by the Allahabad High Court (A. I. R. 1935 All. 353) that a refusal to allow an amendment is a "case decided" within the meaning of section 115 Civil Procedure Code. If this ruling is accepted there can be no doubt that a revision is competent.

The facts of the case are that plaintiff, the respondent herein, and Akbar Hussain for ejectment and damages was

and occupation. The plaint recites that Akbar Hussain was the tenant of plaintiff's vendor but refused to attorn to plaintiff and has been asserting his own title. Plaintiffs vendor also was joined as defendant. Akbar Hussain in his written statement claimed that he was owner and denied the title of plaintiff and of plaintiff's vendor. This written statement was filed in March 1933. Subsequently Akbar Hussain died, and his legal representatives filed a written statement in March 1935. In this they claimed that they were in possession of the suit property in their own right.

Plaintiff then applied to amend the plaint to sue in the alternative for possession on the basis of his title. He stated that he was prepared to pay ad valorem stamp on the value of property. The prayer for amendment was resisted, and the Sub Judge considering that the amendment would change the nature of the suit disallowed it.

Although the written statement of the legal repre sentatives is given as the cause for the amendment, the adverse title had been set up two years earlier in the written statement of Akber Hussain. I understand the contention of the legal representatives to be that the property belonged jointly to them and to Akbar Hussain. The application for amendment certainly is belated.

It is not suggested that refusal of the amendment will deprive plaintiff of the right of suing on his title if he fails in the present suit in establishing tenancy. The proposed amendment will introduce a different cause of action. It will necessitate the proceedings being recommenced from the beginning and I see no practical advantage to any of the parties by allowing it. As already remarked it is not suggested for plaintiff that the refusal deprives him of any right.

I am therefore not prepared to interfere. The application is dismissed with costs.

Re *rejecte*

BEFORE MR. E. WESTON, I. C. S.

Abdul Aziz and *another* ... Defendants-Applicants.

Versus.

Amir Ali and *another* .... Plaintiffs-Respondents

Civil Second Appeal No. 44 of 1934, decided on August 6, 1935, against the decree passed by the Additional District Judge, Ajmer, on March 14, 1934, in Civil Appeal No. 116 of 192[illegible].

Ajmer Regulation (1 of 1877)—Scope—S. 15 and S. 17—When Second Appeal and Reference lie.

A second appeal lies only when the decision of the original Court has been modified or reversed in first appeal. Reference under the Regulation is restricted to points of law upon which the first appellate court [illegible] the decision of the original court.

Civil Procedure Code (1908)—S. 115—Revision lies when no Second Appeal or reference is competent.

No reference would lie in the present case and a right of reference in certain circumstances would not oust the revisional jurisdiction of the Court when those circumstances do not exist.

Civil Procedure Code (1908)—O. 22, R. 3—Representative [illegible]—Appeal abated against one appellant—whole appeal does not abate—Test whether appeal can be proceeded in absence of legal Representative of deceased.

An order that a suit or an appeal abates as a whole [illegible] full directly under O. 22, R. 3 but it is of the nature of an order of [illegible] absence of certain parties to proceed with it. It is to be seen [illegible]

[illegible]

Judgment.—The second appeal arises from a suit filed by respondents 1 and 2 to obtain a share in "nafri" or money given for distribution to Khadims. They sued certain khadims in a representative capacity, and other khadims applied to be joined as parties and were brought on record as defendants under Order 1, Rule 8 (2). Among the persons so brought on record was one Fazal Hussain.

The suit was decreed in favour of respondents plaintiffs. An appeal was then preferred to the District Court in which all the defendants joined as plaintiffs. During the pendency of the appeal Fazal Hussain died, and no application within the period of ninety days was made to bring his legal representative on record. The Additional District Judge then passed an order that the appeal had abated not only as regards Fazal Hussain but as a whole.

The present appeal which is directed against that order purports to be an appeal against the original decree. In the alternative I am asked to treat it as a revision application.

Objection is taken by the respondents that no appeal lies. It is admitted that the suit is one to which Regulation I of 1877 applies. Under this Regulation, a second appeal lies only when the decision of the original Court has been modified or reversed in first appeal. This is not the case in the present suit, and the objection therefore must be accepted. It is further objected that Regulation I of 1877 provides for reference to the Allahabad High Court, and therefore that no revision lies to this Court. The reference under the Regulation is restricted to points of law upon which the first appellate Court has upheld the decision of the original Court. No reference would lie in the present case, and a right of reference in certain circumstances would not oust the revisional jurisdiction of this Court when those circumstances do exist. It is therefore open to me to con-
application and I consider that I sh-

While no doubt the appeal abated as regards Fazal Hussain I do not consider the view that it abated as a whole to be correct. As pointed out by Jolly J. C. in *Kajori Mal* v. *Behari Mal*[1] an order that a suit or an appeal abates as a whole is not an order falling directly under Order 22, Rule 3, but it is of the nature of an order of dismissal as incompetent because it is not possible for the Court in the absence of certain parties to proceed with it.

It is to be seen therefore whether it was not possible to proceed with the appeal in the absence of the legal representatives of Fazal Hussain. The grounds of appeal were common to all the appellants. Under Order 41, Rule 4 the appellate Court could have varied the decree in favour of Fazal Hussain even if he had not appealed. In the circumstances I see no difficulty in hearing the appeal. I set aside the order of the Additional District Court. The appeal is returned for disposal. Costs in this Court to be costs in the appeal.

(1) 4 A. M. L. J. 11. *Appeal Remanded.*

BEFORE MR. E. WESTON J. C. S.

Inder Chand, Seth .... Plaintiff Appellant.

Versus.

Firm Sahib Chand Sahasmal... Defendants Respondents.

Civil Second Appeal No. 70 of 1935, decided on the 3rd March, 1935, against the judgment passed by the Additional District Judge, Ajmer, dated the 30th March 1935, in Civil Appeal No. 172 of 1934.

Hindu Law—Decree passed by a Commissioner (not the Judge) for prosecution of business.

Whatever presumption may exist in the case of businesses opened by the father as Manager of a joint family, no presumption exists of jointness when a business is opened by any co-parcener or by a Manager not the father.

Mr. Jyoti Swarup Gupta—for Appellant.
Mr. Jagan Nath Sharma—for Respondent.

Judgment.—A firm known as Sahibchand Sahasmal of Nayanagar was adjudicated insolvent. In the books of this firm there appeared certain amounts due from two firms styled Manroopmal Inderchand and Inderchand Chaganmal while another sum appeared as due to a third firm Inderchand Babel.

The suit from which this appeal arises was filed by Inderchand son of Manroopmal who describes himself in the plaint as "Karta and Manager of the joint family firms Manroopmal Inderchand, Inderchand Chhaganmal and Inderchand Babel" He sought a decree for the balance due to the third firm after setting off the amounts due to the insolvent firm by the first two firms of which also he claimed to be Karta.

The suit was opposed by the Receivers of the insolvent firm on the ground that the three firms were separate and were not joint family firms. They also disputed the figures of sums due given in the plaint.

The trial Court dismissed the suit holding that the firm Inderchand Babel is not a joint family firm but is owned by Inderchand. In appeal the finding has been upheld but the suit was remanded for an opportunity being given to amend the plaint.

Plaintiff has come in second appeal and it is urged that his suit should have been decreed and that both Courts have ignored the presumption in favour of plaintiff that the three firms are joint family property and there[illegible]e [illegible]

The learned Additional District Judge held that no such presumption existed in favour of plaintiff and relied upon the case *Vadilal* v. *Shah Khushal*[1]. In that case it was held that although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business.

Appellant relies upon a case reported in I. L. R 49 Madras 24. This was a case of the liability of Hindu sons for debts of the father, and it does not assist appellant. In another case I. L R. 40 Calcutta 523 it was remarked

> "There cannot be any doubt in case of families of this nature that there is a presumption of jointness not only of the property but even as regards business which they carry on."

This does not lay down that a business carried on by one is to be persumed the joint property of all.

In I.L R. 52 Bombay 376 it appears to have been accepted that a new business opened by a father as a manager of the joint family is none the less ancestral. But the body of the judgment does not appear to do more than repeat this principle as an argument advanced. This also was a case of liability of sons for the debts of the father, and it was held that they would be liable even if they were separate.

Whatever presumption may exist in the case of businesses opened by the father as manager of a joint family, I can find no foundation for the wider claim made that a presumption exists of jointness when a business is opened by any coparcener or by a manager not the father. If plaintiff wished to rely upon presumption it was incumbent upon him to plead in his plaint the circumstances under which that presumption would exist. The plaint makes no mention of the members of the joint family said to exist. The Courts below therefore were correct in deciding the question on the evidence adduced.

(1) I. L. R. 27 B. 15.

Plaintiff did not give evidence. His son in evidence first said that his father was sole proprietor of the three firms and later that the firms were the joint property of plaintiff himself and a minor brother. Admittedly the three firms had separate shops and kept separate accounts. Their accounts with the insolvent firm were separate. The statement prepared by some servants of the insolvent firm in which the final accounts of the three firms are set off is not evidence of any value.

The findings on evidence however are questions of fact into which I need not enter. My finding that no general presumption exists that the business carried on by a coparcener or manager is joint family property is enough to dispose of the appeal.

The appeal is dismissed with costs.

Appeal dismissed.

BEFORE MR. E. WESTON, I.C.S.

Abdul Ghaffar, Hafiz .... Defendant No. 1—Appellant.

Versus.

Mohamed Shafi and *Ibrahim* .... Respondents

Civil Second Appeal, No. 86 of 1934, decided on September 12, 1935, against the order passed by the special Additional District Judge, Ajmer, on August 2, 1934, in Civil Appeals Nos. 177 and 195 of 1933.

Courts Fees Fees Act (1870)—Sch. 11, Art 17—Suit under O. 21, R. 103 of C.P.C. to be court feed at Rs. 20/- .

O. 21, R. 103 of C.P.C. enables a suit to be filed on a Court fees of Rs. 20/- for possession by a person who has been dispossessed in execution of a decree to which he was not a party, and whose appli[illegible] R. 100 has been disallowed.

Civil Procedure Code (1908)—O. 7, R. 1—Court should see substance and not form of plaint:

It is the substance rather then the form of the suit which should be considered, *5 A. M. L. J. 61* Foll.

Muhammadan Law—Hiba-bil-Ewaz—Release by wife of her claim for dower good consideration:

The release by a wife of her claim for dower is a good consideration for hiba-bil-ewaz, *23 Madras 70* and *7 Lahore 428* Foll.

Muhammadan Law—Father's power of alienation on behalf of minor son—Alienation not binding on minor if not for legal necessity.

Father's power to mortgage on behalf of his minor son is a limited right. A mortgage which is not for legal necessity of the minor son is not binding on him.

R. B. Kanhaiyalal and *Mr. Jawand Lal Dutt Chaudhri*—for Appellant.

Mr. Mohan Lal Capoor—for Respondent.

Judgment.—The facts leading to the present appeal are follows :

Present appellant Hafiz Abdul Ghaffar is mortgagee of the suit property. The mortgage was passed on 3rd July 1924 by Respondent Ibrahim. The mortgage deed Ex. P/9 recites that the property is owned exclusively by Mohamad Shafi the minor son of Ibrahim, since Ibrahim in accordance with an oral gift made by his deceased wife executed a gift deed on 30th November 1921 in favour of the minor. The document goes on to recite that the minor has to pay debt incurred in connection with his marriage and food expenses, and money is also wanted for future maintenance. The mortgage described as usufructuary therefore is passed for an amount of Rs. 3,000 and is signed by Ibrahim in his own capacity and also in the capacity of guardian of the minor. The property is described as two havelis outside Delhi Gate, Ajmer.

Hafiz Abdul Ghaffar did not take physical possession. Ibrahim is said to have passed him a rent note. Ex. P/10 is the plaint in a suit of 1928 filed by Hafiz Abdul Ghaffar against Ibrahim for rent and ejectment. Ex. P/11 is the decree for rent and possession in his favour.

In execution of this decree an objection appears to have been raised by the minor son of Ibrahim through a guardian not his father. A copy of the order passed by the executing Court on the objection is on the record in the present case. It is dated 4th April 1929 and reads

> "I have heard the parties. The application under Order 21, Rule 100 is not maintainable. The decree holder has already got the possession as a mortgagee. The applicant is a son of the mortgagor. If he is dissatisfied he may file a regular civil suit. I reject the application".

The minor by his guardian then filed the present suit. The plaint is not very clear but it asserts that the property now in possession of Abdul Ghaffar is the property of plaintiff and was in his possession by virtue of the following transfers. Ibrahim, plaintiffs father, who originally owned the property gifted it to his wife Mst. Fatma by gift deed dated 1st June 1911. After the death of Mst. Fatma, the date of which is not given, Ibrahim in accordance with the wishes of his wife executed a gift deed in favour of plaintiff dated 30th November 1921 including in the gift any rights of his own.

The mortgage by Ibrahim to Abdul Ghaffar of the year 1924 is said to have been executed fraudulently and without consideration. As plaintiffs application under Order 21, Rule 100 in the execution proceedings of the ejectment degree obtained by Abdul Ghaffar was re[illegible] present suit has been filed for cancellation of the [illegible]d and for ejectment.

Both Ibrahim and Abdul Ghaffar were joined as defendants.

Ibrahim who is said to be insolvent filed a written statement supporting plaintiff. He effected the mortgage to Abdul Ghaffar without consideration, but his explanation that he did so on account of some unexplained transactions with him is a pleading which by reason of its vagueness does not call for serious consideration.

Hafiz Abdul Ghaffar by his written statement claimed that the mortgage was for consideration, that no valid reasons had been shewn for cancellation of the mortgage deed, that the Court fee paid was insufficient, that the suit was not maintainable under section 42 of the Specific Relief Act and that the suit was due to collusion between plaintiff and defendant Ibrahim.

Plaintiff subsequently amended the plaint by adding a prayer for possession. The amendment was allowed on payment of Court fee on the value of the property as determined by the Nazir of the District Court. The property was valued at Rs. 2,600 and plaintiff paid Court fee on this amount.

The trial Court came to the following conclusions. It held that plaintiff has ¾ share in the suit property and that Ibrahim has ¼ share, that the mortgage is not void but is valid to the extent of one fourth and invalid to the extent of three quarters, and that plaintiff could sue to set aside the mortgage deed without alleging fraud.

A decree was passed declaring that plaintiff is owner of three quarters of the property and defendant Ibrahim owner of one quarter of the property. Ibrahim was not competent to alienate the share of his minor son, and so the mortgage is valid to the extent of one fourth share and invalid to the

extent of three quarters share. The prayer for possession was disallowed as it was held that Abdul Ghaffar could not be ejected untill his mortgage was redeemed.

Against this decree both parties appealed to the District Court. Plaintiff appealed against the order upholding the mortgage to the extent of one quarter, against the order refusing possession and against the order for costs.

Abdul Ghaffar appealed against the finding that the mortgage was invalid to the extent of three quarters.

A question of Court fee was raised by Abdul Ghaffar. Plaintiff paid Court fee on Rs. 650, one quarter of the original valuation, on the ground that he was appealing against the order relating to Ibrahim's one quarter share. As he was appealing against the order rejecting in toto his prayer for possession, this argument was untenable. The learned Additional District Judge however accepted a further contention that the suit was really a suit under Order 21 Rule 103 and that the proper Court fee in such a suit is Rs. 20 only and therefore that the appeal was not undervalued.

On the merits of the two appeals the Additional District Judge upheld the finding of the Subordinate Judge that Ibrahim owns one quarter share in the suit property and plaintiff three quarters. He held that the mortgage to Abdul Ghaffar was not fraudulent and was for consideration, that the mortgage is not valid so far as plaintiffs three quarters share is concerned, but is valid to the extent of Ibrahim's one quarter share. As the Sub Judge had held that three quarters of the mortgage was invalid, he considered that equity demanded that the Court should have directed that on payment of one fourth of the mortgage money, th Rs. 750, by plaintiff to Abdul Ghaffar plaintiff shoul entitled to get possession of the whole property.

He therefore dismissed the appeal of Abdul Ghaffar with costs and accepting in part the appeal of plaintiff varied the decree in the manner indicated above, and also modified the Sub Judge's order as to costs.

Abdul Ghaffar has appealed. He urges that possession was allowed to plaintiff by the first appellate Court although proper Court fee was not paid. He claims that the gift deed of 1911 is not valid, that his mortgage was executed by Ibrahim for the benefit of the minor plaintiff and is valid against the entire property, that the order directing him to give up possession on payment of Rs. 750 is illegal and inequitable, that he is entitled to retain possession of at least one fourth share until his mortgage is satisfied, and that plaintiff on the findings of the first appellate Court should have been awarded joint possession only. Certain technical pleas raised have not been pressed before me.

On this appeal Abdul Ghaffar paid Court fee on Rs. 650, the valuation given by plaintiff in his appeal in the District Court, and also on Rs. 260 the valuation given by Abdul Ghaffar in his appeal in the District Court.

Plaintiff also has filed cross objections. He claims that the finding that the mortgage is valid to the extent of one fourth is wrong, that there was no consideration for the mortgage, that by virtue of Ex. P/7 the share of Ibrahim vested in plaintiff, and that Hafiz Abdul Ghaffar by taking the mortgage of the property as the property of plaintiff is estopped from asserting that Ibrahim had any title. He seeks that his claim should be decreed throughout, or in the alternative that plaintiff should be given a decree for possession of three quarters of the property in dispute without any payment by plaintiff to Abdul Ghaffar.

On the cross objections stamp of Rs. 20 has been paid, id to be Rs. 10 for declaration and possession and Rs. 10 r cancellation of the mortgage deed.

The learned Special Additional District Judge while accepting the contention that the suit was under Order 21, Rule 103 has not given reasons for his decision.

As throughout there has been confusion as to the proper amount of Court fee, I will take this question first.

Order 21, Rule 103 enables a suit to be filed on a Court fee of Rs. 20 for possession by a person who has been dispossessed in execution of a decree to which he was not a party, and whose application under Rule 100 has been disallowed. It is not disputed that plaintiff made an application under Rule 100 and although the executing Court appears to have considered it incompetent, it is not clear on what grounds that decision was based. The mortgage under which Abdul Ghaffar's right to possession rested contains specific mention that plaintiff has rights in the property. There is certain evidence on the record in the present suit to shew that even after the mortgage present plaintiff was in possession through tenants. I may refer to rent notes Ex. P/1 and P/2 and to the evidence of Zahur Mohamed whose evidence that he was a tenant from the guardian of plaintiff is supported by rent note Ex. P/4 passed only a few days before the mortgage. Even if Ibrahim was in possession as well be seen later, plaintiff must be taken to have been a tenant in common. The executing Court does not appear to have gone into the question of possession of plaintiff. It is true that the present suit when filed did not purport to be a suit under Rule 103, but the plaint alleged possession by plaintiff and sought ejectment of Abdul Ghaffar. As held in *Chatur Bhuj* v. *Ram Kishendas*[1] it is the substance rather than the form of the suit which should be considered.

I think therefore that the finding of the learned Special Additional District Judge that the suit should be taken to

(1) 5 A. M. L. J. 61.

be one under Rule 103 was correct, and that the objection that possession was allowed without proper Court fee having been paid has no force.

I now turn to the merits of the case.

The gift deed by which Ibrahim gifted the property to Mst. Fatma in the year 1911 is Ex. P/8. The document recites that Ibrahim has to pay mehar and lagat to Mst. Fatma and, as she by her labour has collected money and made pukka constructions in the property, Ibrahim makes the gift to her. It also mentions that at that time Ibrahim had no son but that he had four daughters.

It is not disputed that Abdul Ghaffar had full knowledge of this document. He admits he received it at the time Ibrahim took the mortgage deed. The mortgage deed mentions plaintiffs rights in the property. The Courts below relying upon certain rent notes have held that Mst. Fatma obtained possession after the execution of Ex. P/8.

It is suggested for appellant that the gift purported to be a hiba-bil-ewaz or gift for consideration and that consideration has not been proved. This contention appears to have been raised for the first time in this Court. Appellant in his written statement did not do more than say that he was not in a position to say anything about the validity of Ex. P/8 although the document had been in his possession for a number of years.

In the case reported in 53 I.C. 420 the consideration of a hiba-bil-ewaz was in issue, and as it was held not to have been proved, the gift was held invalid. The case 38 I.C. 882 does not appear to have been decided on the question of consideration although it is remarked that the burden of proving consideration for a hiba-bil-ewaz lies upon the person in whose favour the gift has been passed. That,

the release by a wife of her claim for dower is good consideration for a hiba-bil-ewaz, appears from cases reported in I.L.R. 23 Madras 70 and I.L.R. 7 Lahore 428

In the circumstances I consider the objection raised cannot be gone into now, and I accept the findings of the Courts below that the gift of 1911 to Mst. Fatma was valid.

I equally must accept the findings that the alleged oral gift by Fatma to plaintiff is not proved. This is purely a question of fact.

The position then is that on the death of Fatma the property devolved on her heirs. These heirs do not appear to have been plaintiff and Ibrahim only as the lower Courts have assumed. There is evidence on the record that at the time of her death Fatma had daughters alive. Plaintiffs guardian appears to be married to one of these daughters. How many daughters were living at the time of Fatma's death is not clear. Ibrahim's share however would not be affected by the number of daughters. His share would be one fourth, and the daughters would take with plaintiff as residuaries.

Ex. P/7 is the gift said to have been made by Ibrahim to plaintiff on 30th November 1921. Practically no attempt was made to prove this document, and it is curious that it was not given to the guardian of plaintiff. Ibrahim retained it and handed it over to his mortgagee. The learned subordinate Judge considered that Ibrahim had assured Hafiz Abdul Ghaffar that the gifts were bogus, and this appears likely enough. Ex. P/7 however is not a gift of Ibrahim's share in the property, but purports to carry into execution the alleged oral gift by Mst. Fatma. This oral gift has not been proved. Ibrahim had no authority to pass gift deeds on behalf of Fatma. As I have remarked it also appears that the daughters had rights in the property. I must agree therefore that Ex. P/7 is not a valid gift. It is not assisted by the

evidence that plaintiffs guardian had taken some rent notes from tenants. Plaintiff undoubtedly had rights in the property independent of Ex. P/7.

In this view of the case the argument advanced that the gift being of an undivided share in immovable property would be invalid as musha need not be considered.

Coming now to the mortgage to Hafiz Abdul Ghaffar there is no substantial evidence to shew that this was without consideration. Ibrahim's power to mortgage on behalf of his minor son plaintiff was a limited right, and it has not been established that the mortgage was for legal necessity.

The mortgage therefore is not binding upon plaintiff. It is however binding upon Ibrahim who must be taken to have one fourth share in the property. There is no force in the argument that Abdul Ghaffar is estopped from asserting that Ibrahim has any title. The mortgage specifically recites that it is passed by Ibrahim in his own right as well as in the capacity of guardian of plaintiff. As already remarked the probabilities are that Ibrahim assured Abdul Ghaffar that the gifts were bogus.

I am not able to appreciate the view taken by the learned Additional District Judge that equity demands that the amount of the mortgage should be reduced, and that plaintiff should obtain possession of the whole property on payment of Rs 750. Plaintiff has at present no rights in the share of Ibrahim, and as the mortgage has been held not binding upon him he has no concern in it. Hafiz Abdul Ghaffar is entitled to retain the share of Ibrahim until his mortgage is satisfied. I consider that the appropriate order to be made on the findings is to allow plaintiff a decree for joint possession with Hafiz Abdul Ghaffar. Either then may take his further remedy by suit for partition when the rights of other heirs of Fatma will be safeguarded.

I therefore vary the decree of the lower appellate Court.

Plaintiff is entitled to the declaration that he is not bound by the mortgage. He is not entitled to exclusive possession of the property as the mortgage is valid against the one quarter share of Ibrahim. Plaintiff's share at present is indeterminate. Plaintiff is therefore allowed a decree for joint possession of the suit property with Hafiz Abdul Ghaffar.

The question of costs in this case has become somewhat involved. Plaintiff has only partly succeeded in his suit, and I think it will be equitable to order the parties to bear their own costs throughout.

Decree varied.

BEFORE MR. E. WESTON, I. C. S.

Bishen Lal and *another* .... Plaintiffs—Applicants.

Versus.

Sri Narain and *another* .... Defendants—Respondents.

Miscellaneous Civil Revision No. 29 of 1935, decided on September 7, 1935, against the order passed by the Sub-Judge, First Class, Nasirabad, on June 19, 1934, in suit No. 59 of 1932.

Limitation Act (1908)—S. 14—Revision filed after District Court's finding that no appeal lay—Party entitled to exclusion of time.

Applicant came in Revision only after the District Court's finding that the order is not appealable. In the circumstances applicant is entitled under Section 14 of the Limitation Act to exclude the time spent in prosecuting the appeal, and the revision application is within time.

Civil procedure Code (1908)—O 39, R. 7 (1-a)—Court can order that situation should not be altered.

Order directing that the situation should not be altered pending disposal of the suit was an order which the court was competent to pass.

Messrs. Hem Chandra Sogani and *Sri Krishana Agarwal*—
For applicants.
Messrs. Daya Shanker Bhargava and *Ram Chandra Arun*—
For the Opposite party.

Judgment.—The order against which this revision application is filed was passed upon an application of defendant purporting to be under Order 39 Rules 1, 2 and 7 but the order does not state under what provision it was made. Orders made under Order 39, Rules 1 and 2 are appealable. Applicant did appeal and has come in revision only after the District Court's finding that the order is not appealable. In the circumstances applicant is entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting the appeal, and the present revision application is within time.

On the merits I cannot accept that the Court had no jurisdiction to pass the order Clearly the order refers only to constructions over that part of the site actually in dispute, and the order directing that the situation should not be altered pending disposal of the suit was an order which the Court was competent to pass under Order 39, Rule 7.

I am not prepared to go into the merits of the suit at this stage.

The present application fails and is dismissed with costs.

Revision dismissed.

BEFORE MR. E WESTON, I. C. S.

Firm Sheo Chand Ras Sheo Naram Defendant-Applicant.
Versus
Firm Girdhari Lal Khushi Ram Plaintiff-Opposite Party.

Civil Revision application No 78 of 1935, decided on October 16, 1935, against the order passed by the Sub Judge, First Class, Beawar, on April 26, 1935, in Civil Suit No. 165 of 1930

The Sub Judge however entertained the application although it was opposed by defendants and allowed it. From his order it appears that plaintiff desired to prove his kachchi naqual bahi and other bahis.

There is no suggestion that at earlier stages in the case plaintiff was prevented by any circumstances from leading the evidence now desired. In the cross examination of plaintiff as long ago as 17th February 1931 there appears the statement.

> "I have not brought kachchi naqal. Entries are first made in kachchi naqal.

I am reluctant to interefere with an order allowing further evidence to be led, but assuming that the Sub Judge had discretion to allow evidence at such a stage, that discretion was to be exercised judicially, and although a long order has been passed, I am unable to accept that there has been exercise of judicial discretion.

I allow the application and set aside the order passed. The case is to be returned for disposal on the evidence on record. It will, of course be open to the present Sub Judge to hear arguments on the case if he considers it necessary to do so.

Applicants to have their costs in this Court from plaintiff-opponent.

Revision accepted.

BEFORE MR. E. WESTON, I. C. S.

Sham Singh and *another* .... Applicants.

Versus.

Bakta .... Opposite party.

Criminal Revision Petitions Nos. 4-10 of 1935, decided on July 25, 1935, against the orders passed by the Tahsildar and Magistrate 1st Class, Ajmer, in Criminal Case No. 27 of 1934.

Criminal Procedure Code (1898)—S. 517—Scope—Property neither in custody of Court nor produced before it—Accused did not commit any offence but the person under whose orders they acted had done so—that person not before the court—Magistrate has no jurisdiction to pass any orders for disposal of property:

It does not appear that the grain was in the custody of the court or was produced before it. The persons who were accused had not committed any offence but the person under whose orders they acted had done so. This person however was not before the Court and the finding as against him was no finding at all. No offence was committed so far as the parties were concerned. *Held*, the Magistrate had no jurisdiction to make an order for disposal of property when the property was not in his possession.

Mr. Ballabh Dass Khanna.—for Applicants.

Judgment.—The facts giving rise to this application are as follows.

Bakta filed a complaint of theft against present applicant and twelve others alleging that the accused came to his khala and forcibly and dishonestly removed 44 maunds of grain, and on the following day removed a further 12 maunds.

The defence was that Bakta was a tenant of the Masuda estate, and as he failed to give security for payment of nazrana and hasil, a watchman was posted at his khala. Bakta then left the khala and the grain therefore was removed

The Magistrate found that the grain had been removed without the consent of Bakta, but that as accused were only servants of the estate and acted under orders their dishonest intention had not been established. While acquitting the accused he held that the order to remove was not justified by law, and that the grain removed which he held to be 40 maunds of barley and 10 maunds 8 chataks of khakla should be restored to the complainant under section 517 Criminal Procedure Code.

Against this order directing restoration of the grain the present application if filed, and it is claimed that the

Magistrate acted beyond his jurisdiction as the grain was not in the possession of the Court and actually was in the possession of third parties It is also claimed that the Magistrate usurped the functions of a civil Court when determining the amount of grain taken.

Section 517 Criminal Procedure Code provides that an order for delivery of property may be made when the property has been produced before the Court or is in its custody, or when an offence appears to have been committed regarding it, or when it has been used for the commission of an offence

It does not appear that the grain was in the custody of the Court or was produced before it The finding of the Magistrate must be taken to be that the persons who were accused had not committed any offence, but that the person under whose orders they acted had done so This person however was not before the Court and the finding as against him is no finding at all So far as the parties are concerned it has been held that no offence was committed, and in these circumstances the learned Magistrate had not jurisdiction under section 517 to make an order for disposal of property when the property was not in his possession.

I must allow the application and set aside the order relating to the disposal of property Bakta the Complainant, who has not appeared in answer to the present application, has his remedy by prosecution of the person responsible for the removal, or by recovery in the Civil Courts.

Revision accepted.

BEFORE MR. E. WESTON, I. C. S.

Crown .... Appellant.

Versus.

Narain .... Respondent.

Criminal Appeal No. 10 of 1935, decided on June 26, 1935, against the order passed by the Additional District Judge, Ajmer, on December 22, 1934, in Sessions case No. 15 of 1935.

Criminal Trial—Retracted Confession to be corroborated:

It is a well established rule of prudence that before any reliance is placed upon a retracted confession, it should be corroborated by other evidence in material particulars.

Khan Bahadar Abdul Wahid Khan—For Crown.

Judgment.—This is an appeal filed by the Public Prosecutor under instructions of the Local Government against an order of acquittal passed by the Additional Sessions Judge, Ajmer, in respect of one Narain son of Dhulia who was tried on a charge of murder.

The evidence against Narain consisted only of a short confessional statement made by him before the First Class Magistrate, Kekri, a few days after his arrest, a brief admission of guilt before the Committing Magistrate, and the evidence of his son before the Committing Magistrate which was read as evidence in the Sessions Court under section 288 Criminal Procedure Code. In the Sessions Court accused retracted his confession and alleged that he was beaten and threatened by the Police, while his son also resiled from his earlier statement and maintained that he had implicated his father on account of similar treatment at the hands of the Police.

Accused's son is married to deceased's daughter, and the motive for the murder given in accused's confession is

that deceased desired accused's son to leave his father and live with him.

The learned Additional Sessions Judge considered that it would not be safe to convict on this evidence.

It is a well established rule of prudence that before any reliance is placed upon a retracted confession, it should be corroborated by other evidence in material particulars. It is urged that material corroboration is afforded by the sons evidence before the Committing Magistrate. It is true that an obvious motive exists for the unwillingness of the son to implicate accused in the Sessions Court, but it does not follow that his evidence in the Sessions Court must be false and that before the Committing Magistrate must be true. The statements of the son appear to have been given in circumstances similar to those under which accused gave his statements. Both father and son were sent to the Magistrate for their "confessional" statements to be recorded, and father and son may be said to have been susceptible to the same influences.

The learned Additional Sessions Judge has not been prepared to hold from the demeanour of the son in the witness box that the evidence he heard was false, and that a presumption therefore arose that the evidence given before the Magistrate was true. I have not seen the witness and it is not possible for me to come to any conclusion as to which of the statements should be believed.

In the circumstances there is no case for interference with the order of acquittal. There is, no doubt, considerable suspicion against the accused, but the prosecution must prove their case. The appeal must be rejected.

Appeal rejected.

L.S.D.

A CHART SHOWING THE DISPOSAL OF CRIMINAL WORK IN AJMER-MERWARA.

(Corrected up to November 1, 1935.)

No.	Name of Court.	Ordinary Powers	Special Powers.	Jurisdiction.	Appeals are heard by courts bearing under-mentioned serial numbers.	The Court hears appeal from the orders passed by courts bearing under-mentioned serial numbers.
1	Naib Tehsildar, Todgarh	III Class	...	Whole of Todgarh Tehsil	No. 24	...
2	,, ,, Beawar	II Class	...	Jawaja Police Circle	No. 24	...
3	,, ,, I Ajmer	II Class	...	Gegal, Pushkar and Ajmer Manzuri.	No. 26	...
4	,, ,, II Ajmer	II Class	...	Srinagar, Mangliawas and Nasirabad Police Circles outside Nasirabad Cantonment	No. 26	...
5	Tehsildar, Todgarh	II Class	Section 357 and 164 Cr. P. C. Section 8 (i) of Act VIII of 1897.	Whole of Todgarh Tehsil	No. 24	...
	Tehsildar, Beawar	II Class	Section 164 Cr, P. C.	Beawar Police Circle outside Beawar Municipal limits and villages in Masuda Police Circle which are included in Merwara Sub-division.	No. 24	...
	Tehsildar, Ajmer	II Class	...	1. Pisangan and Nasirabad Police Circles and Kharwa Estate.	No. 26	...
				2. Srinagar and Nasirabad Police Circles outside Nasirabad Cantonment when Naib Naib Tehsildar II has only III Class Powers.	...	...

No.	Name of Court	Ordinary Powers.	Special Powers.	Jurisdiction.	Appeals are heard by courts bearing under-mentioned serial numbers.	The Court hears appeal from the orders passed by courts bearing under-mentioned serial numbers.
8	City Magistrate, Ajmer	I Class	Sections 30 Cr. P. C. Section 192 (2) Cr. P. C. Section 108 Cr. P. C. Section 110 Cr. P. C	Ajmer Municipality and Ajmer Mauzuri and Srinagar Police Circles except cases under Section 124-A I.P.C.	No. 29	...
9	Section "A" of the Bench of Hon. Magistrate Ajmer	I Class	President of each Bench has I Class Powers, without him the Magistrate exercises II Class powers.	Section "A"— Ward No. IX—Kaisarganj including Cavendishpura.	No 26 of II Class Powers exercised and	...
10	Section "B" of the Bench of Hony. Magistrate, Ajmer.	I Class		Ward No. X—Suburbs.	No 29 of I Class Powers exercised.	...
11	Section "C" of the Bench of Hony Magistrate, Ajmer	I Class	...	Ward No. XI—Railway Lines.		...
				Section "B"—		
				Ward No. I—From Madar gate to Agra gate bounded on the East by City wall and on the West by Naya Bazar and Purani Mandi	...	...
				Ward No. II—From Agra gate to Delhi gate bounded on the East by Naya Bazar upto to the Chaupar and on the West by Durgah Bazar.	...	...
				Ward No. III—From Naya Bazar Chaupar to Nala Bazar via Gin Mandi and gali Khatanchiyan and on the South from gali Khatanchiyan upto Durgah Bazar.	...	...

No.	Name of Court	Ordinary Powers.	Special Powers.	Jurisdiction.	Appeals are heard by courts bearing under-mentioned serial numbers.	The Court hears appeal from the orders passed by courts bearing under mentioned serial numbers.
				Ward No. IV—Kayasth Mohalla and Purani Mandi upto Gali Khazanchiyan.	...	...
				Ward No. VII—Lakhan Kotri from Delhi gate to Durgah bounded on the East by Durgah Bazar and on the South by Nala Bazar and Chank Surat Ram.	...	...
				Section "C"—		
				Ward No. V—From Madar gate to Usrigate bounded on the North by Nala Bazar and on the West by Ghasiti and Diggi Bazar.	...	...
				Ward No. VI—From Ghasiti to Langer Khana Gali including Nawab Ka-Bera and Regar Mohallah.	...	...
				Ward No. VIII—Khadim Mohalla, Shorgar Mohalla, Durgah, Lakhan Kotri, Silawat Mohalla and Inderkot	...	...
	Hony. Magistrates of the Municipal side, Ajmer	II Class	...	Ajmer Municipal Police Circle (Municipal Challans).	No. 26	...
	Hony. Magistrates, Police side, Ajmer ...	II Class	...	Ajmer Municipal Police Circle (Police Challans).	No 26	...
	Hony. Magistrate Deoli	I Class	Section 260 Cr. P. C.	Deoli Municipal limits	No. 29	...

No.	Name of Court.	Ordinary Powers.	Special Powers.	Jurisdiction.	Appeals are heard by courts bearing under mentioned serial numbers.	The Court hears appeals from the orders passed by courts bearing under-mentioned serial numbers
15	Deputy Magistrate, Nasirabad	I Class	Section 13, 260 and 407 Cr. P. C.	Nasirabad Cantonment limits ...	No. 29	...
16	Sub-Divisional Officer, Kekri	I Class	Section 13, 110, 260, 407 (2) and 108 Cr. P.C.	Bhinai, Kekri, Goela and Sawar Police Circles	No. 29	...
17 (3)	Income Tax Officer, Ajmer	I Class	Section 8 (1) of Act VIII of 1897. Section 260 Cr. P. C.	As may be fixed by District Magistrate	No 29	...
17	Treasury Officer, Ajmer ...	I Class	Sections 260, 407 (2) and 367 Cr. P. C.	Pisangan, Mangalawas and Pushkar Police Circles. Gegal Police Circle.	No. 29	...
18	Railway Magistrate, Ajmer.	I Class	...	Within Railway limits	No. 29	...
19	Special Hony. Magistrate, Ajmer	I Class	...	Cases under prevention of cruelty to animals Act in Ajmer Municipality and area within 5 miles thereof	No. 29	...
20	Hony. Magistrate, Beawar.	III and II Class	...	Beawar Municipal limits	No. 24	...
21	Hony. Magistrate, Nasirabad	II Class	...	Nasirabad Cantonment limits ...	No. 26	...
22	Hony. Magistrate, Kekri	II Class	...	Kekri Municipal limits	No. 26	...
23	Hony. Magistrates in Ajmer and Kekri Sub-divisions (Honorariars)	III II & I Class	...	Their respective estates	No. 26 and 29 if for I Class.	...

Name of Court.	Ordinary Powers.	Special Powers	Jurisdiction.	Appeals are heard by courts bearing under-mentioned serial numbers.	The Court hears appeal from the orders passed by courts bearing under-mentioned serial numbers.
Extra Assistant Commissioner, Merwara	I Class	Sections 13, 260 and 407 (2) Cr. P. C. Sections 435, 108 and 357 of Cr. P.C. Section 8 (i) of Act VIII of 1897	Beawar, Jawaja, Jassakhera, Todgarh, and Dawer Police Circles. Also villages in Masuda Police Circles which are within Merwara sub-division.	No. 29	Nos. 1, 2, 5, & 6.
Registrar, Co-operative Societies, Ajmer	II Class	...	Srinagar Police Circle	No. 26	...
Assistant Commissioner, Ajmer-Merwara	Sub-Divisional Magistrate 1st Class Additional District Magistrate	Sections 110, 260 and 407 (2) Cr. P.C. Section 30 Cr. P.C. Section 124 A.IP.C. Indian Treasure Trove Act A. D. M. for Ajmer-Merwara	Ajmer Municipal and Ajmer Manzuri Police Circle also Nasirabad Police Circle and Nasirabad Cantonment.	No. 29	Nos. 7, 3, 4, 9, 10 and 11 if II Class 12, 13, 21, 22. 23, and 25.
General Manager Court of Wards	I Class	Sections 260 and 357 of Cr. P. C	Estates under Court of Wards and Masuda Police Circles (excluding villages in Merwara sub division.	No. 29	...
District Magistrate Ajmer-Merwara	District Magistrate ...	Section 30 and 357 of Cr. P. C.	Ajmer-Merwara.	No. 31	...
Additional Session Judge	Sessions Judge.	...	...	No. 31	Nos. 8, 9, 10 & 11 if I class and Nos. 14, 15, 16, 16 (a), 17, 19, 25, 26, 24, and 27.
Sessions Judge	Sessions Judge.	...	...	No. 31	Nos. 27 (when cases tried ander see 30, Cr. P. C.
Civil Commissioner	High Court	...	...	...	Nos. 29 and 30.

END.

COMMITTEE.

1. Mr. Suresh Chandra Maheshi.
2. Mr. Birdhi Chand Lakhotia.
3. Mr. Hira Lal Jain.

1. This part completes the volume for 1935 Ajmer-Merwara Law Journal. The indices for the *whole volume* will be supplied shortly.

2. The section containing 'Notifications' has a separate paging The pages containing 'Notifications' in the different parts may be put together and placed after the section containing Reports at the time of getting the volume bound.

3. The last page in Part II, containing Reviews has been wrongly numbered as 67. It may be placed after the section containing Notifications.

4. The Editor is grateful to Mr. Mahesh Chandra Sharma for supplying the corrected chart of Criminal Jurisdiction.

Special Concession.

Present and future subscribers to the Ajmer-Merwara Law Journal can get the Supplement, Digest and Volumes IV, V, VI and 1934 of Ajmer-Merwara Law Journal at *half* price. The concession will be available only till May 1936.

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